EDITOR'S NOTE

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No. 84-782-CFX
Status: GRANTED

Docketed:
November 14, 1984

Title: South Carolina, et al., Petitioners
v.
Catawba Indian Tribe of South Carolina

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Meclock, T. Travis, Christie Jr., John C., Todd, J. D., Byrd Jr., Dan M., St. Clair, James D.

Counsel for respondent: Miller, Don B.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Nov 14 1984 | G | Petition for writ of certiorari filed. |
| 2 | Dec 19 1984 | | DISTRIBUTED. January 11, 1985 |
| 3 | Dec 21 1984 | X | Brief of respondent Catawba Indian Tribe of SC in opposition filed. |
| 4 | Jan 4 1985 | X | Reply brief of petitioners South Carolina, et al. filed. |
| 5 | Jan 14 1985 | | The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Powell DUT. |
| 6 | May 8 1985 | | Brief amicus curiae of United States filed. |
| 7 | May 14 1985 | | REDISTRIBUTED. May 30, 1985 |
| 8 | May 22 1985 | X | Supplemental brief of respondent Catawba Indian Tribe of SC filed. |
| 9 | May 24 1985 | X | Reply brief of petitioners South Carolina, et al. filed. |
| 10 | Jun 3 1985 | | Petition GRANTED. |
| | | | ********** |
| 16 | Jul 18 1985 | | Brief of petitioners South Carolina, et al. filed. |
| 17 | Aug 19 1985 | | Brief of respondent Catawba Indian Tribe of SC filed. |
| 18 | Sep 3 1985 | | Joint appendix filed. |
| 19 | Sep 26 1985 | | Record filed. |
| 20 | Sep 26 1985 | | Certified original record & proceedings, 17 volumes including 3 vols. of appendix received. (Box). |
| 21 | Oct 18 1985 | | CIRCULATED. |
| 22 | Oct 22 1985 | | SET FOR ARGUMENT, Wednesday, December 11, 1985. (2nd case). |
| 23 | Nov 29 1985 | | Application for leave to file a reply brief in excess of the page limitation filed (A-429), and order granting same by Burger, C.J. on December 4, 1985. The brief may not exceed 25 pages. |
| 24 | Nov 29 1985 | | |
| 25 | Dec 2 1985 | X | Reply brief of petitioner South Carolina filed. |
| 26 | Dec 9 1985 | | RESCHEDULED FOR ARGUMENT, Thursday, December 12, 1985. (second case). |
| 27 | Dec 12 1985 | | ARGUED. |

84-782

No. ——

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

J.D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, S.C. 29602
(803) 242-6440
*Attorneys for C.H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, South Carolina 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

JAMES D. ST. CLAIR, P.C.*
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
STATE OF SOUTH CAROLINA
Rembert Dennis Building
Columbia, South Carolina 29211
(803) 758-3970
*Attorneys for the State of South Carolina*

November 14, 1984

* Counsel Of Record For Each Petitioner

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## QUESTIONS PRESENTED

Whether a four to three majority of the Fourth Circuit Court of Appeals erred in holding:

(1) That the Catawba Indians are immune from state statutes of limitations even though a 1959 federal statute explicitly provides that "the laws of the several states shall apply to them in the same manner they apply to other persons?"

(2) That the Catawba Indians may claim a special legal status under federal law—which would bind the United States as their trustee, permit them to act as a sovereign entity, and enable them to assert a 140-year-old claim under an 1834 federal Indian statute called the Nonintercourse Act—even though a 1959 federal statute explicitly provides that "the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians" and provides that federal Indian statutes "shall not apply to them?"

(3) That the Catawba Indians can assert a claim to land under federal law, based solely on an alleged absence of federal approval for a voluntary sale of that land, even though Congress was aware of the 1840 sale when it passed legislation in 1959 that treated the sale as an accomplished fact, implicitly ratifying the sale?

## PARTIES IN THE COURT OF APPEALS

Seventy-six named defendants are alleged to represent a defendant class of 27,000 landowners.[1] The named defendants include individuals, a family trust, a religious organization, private companies, local government or-

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[1] A motion to certify the alleged class was filed but the district court stayed consideration of it pending the ruling on the dispositive motion filed by the defendants which is the subject of the petition.

The named defendants are the State of South Carolina, Richard W. Riley as Governor of the State of South Carolina; County of Lancaster, and its County Council consisting of Francis L. Bell as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus; City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gil, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr.; Bowater Carolina Corporation; Catawba Timber Co.; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Cresent Land & Timber Corp.; Duke Power Company; Flint Realty and Construction Company; Herald Publishing Company; Home Federal Savings and Loan Association; Rock Hill Printing & Finishing Company; Roddey Estates, Inc.; Southern Railway Company; Springs Mills, Inc.; J.P. Stevens & Company; Tega Cay Associates; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; Nisbet Farms, Inc.; C.H. Albright, Ned Albright; J.W. Anderson, Jr., John Marshall Walker II, Jesse G. Anderson, John Wesley Anderson, David Goode Anderson; W.B. Ardrey, Jr., Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; W. Watson Barron, Wilson Barron; Archie B. Carrol, Jr.; Hugh William Close, James Bradley, Francis Lay Springs, Lillian Crandall Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr.; Robert A. Fewell; W.J. Harris, Annie F. Harris; T.W. Hutchinson, Hiram Hutchinson, Jr.; J.R. McAlhaney; F.M. Mack, Jr.; Arnold F. Marshall; J.E. Marshall, Jr.; C.D. Reid, Jr.; Will R. Simpson, John S. Simpson, Robert F. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshall E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Good, R.N. Bencher, W.O. Nisbet III; Pauline B. Gunter; J. Max Hinson; W.A. McCorkle, Mary McCorkle; William O. Nisbet; Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin; Robert M. Yoder.



ganizations and the State of South Carolina. The plaintiff is "The Catawba Indian Tribe, Inc.," a non-profit organization incorporated in 1975 under South Carolina law, and operated by persons who claim to be descendants of Catawba Indians.

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IN THE

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OCTOBER TERM, 1984

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No.

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STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, entered on August 17, 1984.

## OPINIONS BELOW

On June 14, 1982 the district court granted the defendants' ("petitioners' ") motion for summary judgment and dismissed the action. The decision of the United States District Court for the District of South Carolina (the Honorable Joseph P. Willson sitting by designation of Mr. Chief Justice Burger) is unreported but appears in the Appendix as Exhibit E.

The plaintiff ("respondent" or "Catawbas") appealed, and, on October 11, 1983, a divided three-judge panel reversed the district court's decision. The majority and

dissenting opinions of the original panel[1] are reported at 713 F.2d 1291-1303 (4th Cir. 1983) and appear in the Appendix as Exhibits B and C, respectively.

The petitioners sought and obtained a rehearing *en banc*.[2] On August 17, 1984, in a single paragraph *per curiam* opinion, four judges adopted the majority opinion of the original panel and three judges adopted the dissenting opinion. One judge who joined in the *en banc* majority decision also issued a concurring opinion. The *en banc per curiam* decision and the concurring opinion are reported at 740 F.2d 305 (4th Cir. 1984) and appear in the Appendix as Exhibits A and D.[3]

## JURISDICTION

This Court has jurisdiction to review the final decision of the court of appeals under 28 U.S.C. § 1254(1) (1976).

## STATUTE TO BE CONSTRUED

The decisions below construed a 1959 Act of Congress, 25 U.S.C. §§ 931-938 (1976), the complete text of which is reprinted in the Appendix as Exhibit F. Section 5, which is the principal focus of the decisions, provides:

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[1] The original panel was Senior Judge Butzner and Judges Hall and Sprouse. Senior Judge Butzner wrote the majority opinion. Judge Hall wrote the dissenting opinion.

[2] Seven judges of the Court of Appeals for the Fourth Circuit formed the *en banc* panel. Only six of the nine active judges of the Fourth Circuit Court of Appeals participated. Judges Russell and Chapman from South Carolina and Judge Ervin from North Carolina recused themselves. Senior Judge Butzner was the seventh judge who participated in the *en banc* decision because he was a member of the original three-judge panel.

[3] The *en banc* majority was composed of Chief Judge Winter, Senior Judge Butzner, and Judges Murnaghan and Sprouse. Judges Hall, Phillips and Widener dissented. Judge Murnaghan authored the concurring opinion.



> The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in sections 931-938 of this title, however, shall affect the status of such persons as citizens of the United States.

## STATEMENT OF THE CASE

### I. The Parties And The Nature Of The Claim

By this action, the respondent seeks to "destroy the titles of more than 27,000 South Carolina citizens"[4] to approximately 144,000 acres (225 square miles) of land at the northern border of South Carolina in York, Lancaster and, perhaps, Chester Counties.[5] The respondent claims the current right to own and possess this land and demands trespass damages from 1840 to the present.

The land in dispute encompasses the City of Rock Hill, the town of Fort Mill, and a number of smaller communities. Thousands of families, as well as small businesses, farms, trusts, lending institutions, manufacturers, churches, charitable organizations, local governments, and the State of South Carolina currently hold interests in the land. Seventy-six individuals, companies and public entities have been named as defendants and as represen-

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[4] Appendix, Ex. C, p. 24a (the dissenting opinion).

[5] The precise boundaries of the land at issue are uncertain because of the poor quality of eighteenth-century surveying and mapping.

tatives of an uncertified putative defendant class alleged to consist of more than 27,000 persons.

Respondent is a non-profit organization incorporated in 1975 under South Carolina law which calls itself "the Catawba Indian Tribe." This organization contends that a voluntary sale of the lands in issue pursuant to an 1840 treaty with the State of South Carolina was invalid, that it retains today the right to void the 1840 transaction, that it may recover millions of dollars in damages for nearly a century-and-a-half of alleged trespasses, and that it may dispossess thousands of innocent people from their homes and farms and businesses. According to the respondent, a federal statute known as the Nonintercourse Act[6] required federal approval or consent to this voluntary sale and such federal approval or consent was lacking.

### II. The Proceedings Below And The Issues For Review

The district court granted summary judgment, holding that a 1959 federal statute commonly referred to as the "Catawba termination act," 25 U.S.C. §§ 931-938 (1976), had profoundly altered the Catawbas' legal status and, as a matter of law, precluded their claim. Accordingly, the district court held that it was not necessary to resolve the many disputed historical facts and principles of nineteenth century law raised by the respondent's claim.[7]

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[6] The Nonintercourse Act is presently codified at 25 U.S.C. § 177 (1976). The term refers to restrictions on the alienation of Indian lands contained in a series of more comprehensive acts regulating Indian affairs, each known as the "Indian Trade and Intercourse Act," first enacted in 1790 and most recently modified in 1834.

Jurisdiction in the district court was asserted pursuant to 28 U.S.C. §§ 1331, 1337 and 1361.

[7] In the courts below, the Catawbas recited in detail their version of historical events. The petitioners consistently noted throughout the proceedings that many of these matters would be sharply disputed by the petitioners, but that, for purposes of the motion for summary judgment only, the Catawbas' assertions regarding their historical factual and legal situation were assumed to be true.

In addition, the petitioners assumed, for purposes of argument only, the existence of a private right of action under the Nonintercourse Act. Similarly, the summary judgment motion did not address the question whether state law defenses had commenced to run at some earlier time, before enactment of the termination legislation, or whether state law defenses have been "borrowed" by federal law for application to land claims under the Nonintercourse Act. These issues are currently pending before this Court in County of Oneida, N.Y. v. Oneida Indians (*"Oneida"*), 719 F.2d 525 (2d Cir. 1983), *cert. granted*, 104 S.Ct. 1590 (1984) (No. 83-1065) (argued October 1, 1984). If any of these issues is resolved favorably to the petitioners in *Oneida* a remand to the court of appeals for reconsideration in light of the *Oneida* decision would appear to be appropriate.



The district court concluded that there were four independent, alternative bases for dismissal. First, it recognized that the Catawba termination act declares in plain language that state law shall apply to the Catawbas. Based on the plain language of the act, confirmed by statements in its legislative history that the purpose of the act was to give the Catawbas the same legal status, rights and obligations as other citizens, the district court held that a South Carolina statute of limitations began to run on July 1, 1962 (the undisputed effective date of the Catawba termination act) and that the ten-year statute had expired before the Catawbas brought this action in 1980.

Second, the district court held that the Catawba termination act ended any legal status the Catawbas may have had as a tribe or governmental entity within the meaning of federal laws such as the Nonintercourse Act, precluding the respondent from establishing one element of a *prima facie* case under the Nonintercourse Act, present or continuous tribal existence.

Third, the district court held that Congress retroactively ratified the 1840 treaty transfer by enacting the

Catawba termination act, precluding the respondent from establishing yet another element of a *prima facie* case under the Nonintercourse Act. The 1840 treaty was referred to in the House Committee Report for the Catawba termination act, and the act itself made provision for certain assets that the Catawbas had received as a result of the 1840 treaty. As a result, the district court held Congress to have implicitly ratified the 1840 transaction.

Fourth, the district court held that the Catawba termination act ended any trust relationship between the federal government and the Catawbas, precluding the respondent from establishing still another element of a *prima facie* case under the Nonintercourse Act. The district court based its conclusion on a number of factors. It noted that the Catawba termination act was one of a number of similar statutes passed pursuant to a federal policy to make Indians subject to the same laws as other persons and to terminate any special status the Indians may have previously held under federal law. The district court also relied upon decisions by this Court and the Ninth Circuit Court of Appeals.

The Catawbas appealed. On October 11, 1983, by a vote of two to one, a panel of the court of appeals reversed the district court and remanded for further proceedings on the merits. Declaring that "statutes that affect Indian tribes . . . should not be construed to the Indians' prejudice," the majority held: (1) that the respondent is immune from state law, including the South Carolina statute of limitations, (2) that the respondent is not precluded as a matter of law from proving that the Catawbas currently hold the status of a tribe under federal law, (3) that Congress did not ratify the 1840 treaty by enacting the 1959 legislation, and (4) that the respondent may claim a trust relationship with the federal government.



The petitioners sought and received a rehearing *en banc* which resulted in the decision of August 17, 1984.[8]

The district court's decision, the appeal, and the questions presented for this Court's review all focus on the proper construction of modern-day legislation, the Catawba termination act, 25 U.S.C. §§ 931-938 (1976). No dispute exists that this act became effective and now applies to the Catawbas. The only dispute concerns the meaning and consequent effect of the statute. Three dissenting Fourth Circuit judges and the district court viewed that legislation to make state law apply and to change the political and legal status of the Catawbas in ways that preclude them from asserting special privileges under federal law. Four Fourth Circuit judges held that the legislation had limited effect, and that the Catawbas remain cloaked with the special privileges necessary to pursue this 140-year-old claim.

## REASONS FOR GRANTING THE WRIT

### I. The Questions Presented Are Of Extreme Importance.

#### A. *If Not Reviewed Now, The Majority's Decision Will Burden 27,000 Innocent South Carolina Citizens For Years With The Threat Of Ejectment From Their Homes and Businesses.*

The respondent seeks to dispossess 27,000 innocent persons from lands which they and their predecessors have held for generations and to compel them to pay millions of dollars in damages for trespasses allegedly occurring as long as 140 years ago. The relief sought is so monumental that Judge Murnaghan called it an "impossible" remedy in his concurring opinion. By any definition, a decision having such an effect upon all land

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[8] The decision of the panel adopted by the four judges of the *en banc* court will be referred to as the "majority opinion," or "majority decision."

titles within a 225-square-mile area, is one of exceptional importance.

The respondent may argue that review should be postponed until the conclusion of all proceedings. Prompt review is required, however, not only because of the enormous interests at stake but because these 27,000 innocent landowners will suffer substantial and unnecessary harm even if they ultimately prevail on the merits or later secure review by this Court. Indian land claims are complex, involve many competing and significant interests, and are not easily or quickly litigated. For example, this Court heard argument on October 1, 1984, in *County of Oneida, New York* v. *Oneida Indians*,[9] fourteen years after the *Oneida* action was commenced. Accordingly, if review is not granted now, it may be a decade or more until this Court again has the opportunity to review the potentially dispositive issue of whether the 1959 Catawba termination act, as a matter of law, barred the action when it was commenced in 1980. During those years there will be a cloud on the land titles of whole communities, property values will be depressed, innocent citizens will be forced to defend their homes and businesses in protracted litigation at great expense, and governmental decisions will have to be based in part on speculation about how this Court might ultimately decide the issues concerning the Catawba termination act.

Judge Murnaghan's concurring opinion underscores the very real anguish and harm that delayed review could cause. He acknowledged that the dispossession of thousands of innocent parties,[10] nearly a century and a half after the allegedly invalid transaction, is a terrible,[11] but

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[9] County of Oneida, N.Y. v. Oneida Indians, 719 F.2d 525 (2d Cir. 1983), *cert. granted*, 104 S.Ct. 1590 (1984) (No. 83-1065) (argued October 1, 1984).

[10] Appendix, Ex. D, p. 30a.

[11] Appendix, Ex. D, p. 34a.

> Since the Tribe's claim . . . includes the right to actual possession, a complete victory for the Catawba Tribe would leave up



real, prospect.[12] He described the innocent landowners as bearing an "awesome risk." [13]

So "awesome" a risk ought not be lightly visited upon 27,000 landowners. Yet four federal judges have held, that as a matter of law, this claim must fail, and four have held that it may proceed. A review by this Court should not be delayed.[14]

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> in the air or by the side of the road the approximately 27,000 people claiming title. . .
>
> It would indeed be tragic and unfair for the long-overdue resolution of the Catawba Tribe's claims to occur exclusively and disproportionately at the expense of the more than 27,000 innocent South Carolina citizens with claims to the contested land . . . reaching back over 140 years. By our society's general attitude, a title of that uninterrupted duration should be good against the world.

[12] Appendix, Ex. D, p. 30a.

> I . . . therefore harbor grave doubts, that, as a matter of grace, a government will rescue the current occupants of the land . . . .

[13] Appendix, Ex. D, p. 30a.

[14] Judge Murnaghan suggested in his concurring opinion that restoration of the land to the Indians was so "impossible" or unthinkable that "just compensation" from the State of South Carolina and/or the United States should be the only form of relief available to the respondent.

This suggestion of exclusive relief against the two sovereigns is, of course, only a suggestion by a single judge. Furthermore, it is of little practical benefit to the thousands of families and businesses whose lands are sought by the respondent. They have already borne an immense burden of four years of litigation and uncertain title. While the action is pending, they will continue to face awesome risks and burdens, even if they are eventually successful in defending the case on its merits or in promoting the doctrine suggested by Judge Murnaghan that it is impossible to restore lands held by innocent third parties to Indian ownership.

The petitioners joined together—private parties, local governments and the State of South Carolina—in moving for summary judgment on the basis of the Catawba termination act because that was the most efficient way to end the case entirely and to end un-

Judge Murnaghan hoped for "enlightened . . . legislative or executive action," to "rescue the current occupants of the land." [15] But that rescue will be even less likely if the Court does not now grant review. Having failed to act before,[16] Congress is unlikely to act now, when four federal judges have held the Catawbas' claim to be barred as a matter of law and four have held it to be viable. Before acting, an "enlightened" legislative or executive body may rightly demand to know whether the request is based upon legal or moral imperatives.

Another, related, consideration also compels review now. This Court consistently has recognized the importance of continuity, certainty, and stability in real property law.[17] The issues raised here have sharply, and equally, divided the eight federal judges who have considered them. Until these issues are definitively resolved by this Court, dispute and doubt will supplant certainty. To protect the public interest in the establishment of

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certainty in the region about the marketability of land titles. Many of the petitioners may have additional defenses that differ from each other. For example, in the court of appeals the private parties pointed out that the Catawbas may only have a claim against South Carolina. *See, e.g.*, Petition for Rehearing, and Suggestion of Rehearing *En Banc* (Oct. 25, 1983). But the Eleventh Amendment may shield South Carolina if it should be confronted by a requirement to raise from its citizens the staggering sums that the respondent would seek in compensation for these lands.

[15] Appendix, Ex. D, p. 30a.

[16] Several attempts to settle the Catawbas' claims by legislation have been unsuccessful. *See* The Catawba Restoration and Settlement Act, H.R. 3274, 96th Cong., 1st Sess. (1979), an act seeking to restore the Catawba Tribe of South Carolina as a federally recognized tribe and to settle all land claims of the tribe; *see also* Ancient Indian Land Claims Settlement Act of 1982, H.R. 5494, 97th Cong., 2nd Sess. (1982).

[17] *E.g.*, Nevada v. United States, —— U.S. ——, 103 S.Ct. 2906, 2918 n.10 (1983); Arizona v. California, 460 U.S. 605, 619 (1983); United States v. Title Insurance and Trust Co., 265 U.S. 472 (1924); Minnesota Co. v. National Co., 70 U.S. (3 Wall.) 332, 334 (1865).



clear and correct principles of real property law this Court should now review the questions presented.

### B. *The Majority's Construction Of The Catawba Termination Act Will Create Uncertainty As To The Legal Status Of Other Indians Subject To Termination Acts.*

The Catawba termination act is not an isolated piece of legislation. A number of Indian groups were subject to legislation similar to the statute construed in this case.[18] This Court has referred to the Catawba act as

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[18] The Catawba termination act was passed during a period in the 1950's and early 1960's when Congress sought to end federal paternalism toward Indians. As Congress declared in officially adopting this policy:

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . .

H.R. Cong. Res. 108, 67 Stat. B132 (1953).

Pursuant to this policy, Congress passed a dozen termination acts affecting approximately 100 tribes, bands and rancherias between 1954 and 1962. Enacted termination statutes are listed in alphabetical order by the name of the terminated Indian group:

> Alabama-Coushatta, 25 U.S.C. §§ 721-727, 68 Stat. 769 (1954); California Rancheria (including a number of Indian bands), 72 Stat. 619 (1958); Catawba, 25 U.S.C. §§ 931-938, 73 Stat. 592 (1959); Klamath, 25 U.S.C. §§ 564-564x, 68 Stat. 718 (1954); Menominee, 25 U.S.C. §§ 891-902, 68 Stat. 250 (1954); Mixed-Blood Ute, 25 U.S.C. §§ 677-677aa, 68 Stat. 868 (1954); Ottawa, 25 U.S.C. §§ 841-853, 70 Stat. 963 (1956); Peoria, 25 U.S.C. §§ 821-826, 70 Stat. 937 (1956); Ponca, 25 U.S.C. §§ 971-980, 76 Stat. 429 (1962); Southern Paiute, 25 U.S.C. §§ 741-760, 68 Stat. 1099 (1954); Western Oregon (including a number of Indian bands), 25 U.S.C. §§ 691-708, 68 Stat. 724 (1954); Wyandotte, 25 U.S.C. §§ 791-807, 70 Stat. 893 (1956).

Indians in California, Oregon, Texas, Wisconsin, Utah, Oklahoma, and Nebraska, as well as South Carolina, were affected by these acts, and millions of acres of land may be the subject of ancient land claims by these Indians.

"one of a series of termination acts," [19] all of which provide for the distribution of some assets, provide that the affected Indians cease to be entitled to special services from the United States on the basis of their status as Indians, provide that federal Indian statutes no longer apply to them, and provide that state law shall apply to them in the same manner as to other persons.

As more fully discussed below, the majority opinion is not only incompatible with the explicit language of the Catawba termination act, but also reaches a result diametrically opposed to the aims of the Congress that passed such legislation, and conflicts with decisions by this Court and by other courts of appeal concerning the legal status of Indians under federal law after they become subject to a termination act.

Accordingly, if the majority opinion is not reviewed, other Indians subject to termination legislation may rely upon it to reassert special privileges under federal law and to commence land claim litigation based on ancient events.[20] This revitalization of potential claims by Indians whose special status under federal law was previously considered terminated could cloud the titles of thousands of innocent parties across the country.

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[19] *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 133 n.1 (1972) (listing the Catawba act as one of several termination acts).

[20] For example, the Alabama-Coushatta Indians, the subjects of a 1954 termination act, currently have pending before the Federal Claims Court an action for damages against the United States for failing to prevent the alienation of over 17 million acres in Texas and Louisiana. Cong. Ref. No. 3-83 (Feb. 22, 1984). These terminated Indians claim a violation of the Nonintercourse Act. The decision of the Fourth Circuit majority, holding that terminated Indians can establish federal tribal status and the federal trust relationship required to bring a Nonintercourse Act claim may be argued to permit the Alabama-Coushatta Indians to bring a Nonintercourse Act claim against innocent private landowners for recovery of the land instead of, or in addition to, a damage action against the United States.



## II. The Decision Of The Majority Should Be Reviewed Because It Conflicts With Decisions Of This Court And Decisions Of Other Courts Of Appeals.

### A. *The Majority's Holding That State Law Does Not Apply To The Catawbas Conflicts With This Court's Holding That The Same Laws Apply To Indians Subject To Termination Legislation As To Other Persons.*

In *Affiliated Ute Citizens of Utah* v. *United States* (*"Affiliated Ute"*),[21] this Court held that Indians who are subject to termination legislation must enforce their property rights under the same laws and in the same manner as other citizens, without special privileges under federal law and without assistance from the United States.[22] The Fourth Circuit majority reached precisely the opposite conclusion, holding that the Catawbas are not subject to the same state laws as are other persons, that they are entitled to some special privileges not available to other citizens under federal statutes and that they may claim a special relationship with the United States.

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[21] Affiliated Ute Citizens of Utah v. United States (*"Affiliated Ute"*), 406 U.S. 128 (1972), *aff'd in part and rev'd in part*, Reyos v. United States (*"Reyos"*), 431 F.2d 1337 (10th Cir. 1970).

[22] *Id.* at 149-50 (1972). The termination act construed in *Affiliated Ute* terminated mixed-blood Ute Indians but did not affect full-blood members of the Ute tribe. The terminated mixed-blood Indians retained an interest in tribally-held mineral resources, but their interest was converted into shares of stock in a corporation which jointly managed those tribal resources with the unterminated members of the Ute tribe. The stock was subject to special rules regarding transfer. Eventually some terminated Indians sold their shares. There were irregularities in the sales, and the terminated Indians argued that the United States still owed them special protection. The Tenth Circuit rejected the argument and ruled that the Indians had to enforce their property rights, which were rights in tribal property, under the same securities laws as non-Indian citizens. Reyos v. United States, 431 F.2d 1337, 1343 (10th Cir. 1970). This Court affirmed. *Affiliated Ute*, 406 U.S. 128, 144-50 (1972).

The majority achieved their anomalous result by failing even to mention this Court's decision in *Affiliated Ute*, much less attempting to reconcile their decision with it. The dissenting judges, in contrast, recognized that *Affiliated Ute* governs this case and that the majority's analysis squarely conflicts with *Affiliated Ute*.[23] This irreconcilable conflict with a controlling decision by this Court warrants review.

Moreover, the Fourth Circuit majority's opinion also ignores, and is in conflict with, declarations by this Court that state law applies to Indians who are subject to termination legislation. In *Bryan* v. *Itasca County, Minnesota* (*"Bryan"*),[24] this Court noted that a termination act is an explicit congressional direction that state law shall apply to the affected Indians. Comparing the explicit language of the termination acts to more general legislation extending only limited state jurisdiction over Indians, the Court declared in *Bryan*:

> [T]ermination Acts [are] . . . cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation.[25]

Similarly, in *United States* v. *Antelope* (*"Antelope"*),[26] this Court declared that, although non-terminated Indians are subject to the federal Major Crimes Act, terminated Indians are subject to state criminal laws.

Finally, review is required because the majority's decision that state law does not apply to the Catawbas directly conflicts with two decisions by the Ninth Circuit.

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[23] Appendix, Ex. C, p. 27a.

[24] Bryan v. Itasca County, Minnesota (*"Bryan"*), 426 U.S. 373 (1976).

[25] *Id.* at 389.

[26] United States v. Antelope (*"Antelope"*), 430 U.S. 641, 647 n.7 (1977).



In *United States* v. *Heath* (*"Heath"*), the Ninth Circuit declared:

> [Terminated Indians] are subjected to state laws and are to be dealt with by the law no differently than any other citizen of a state.[27]

So, too, in *Taylor* v. *Hearne*,[28] the Ninth Circuit affirmed the dismissal of an action brought by a terminated Indian to recover land once a part of the Auburn Rancheria. The court ruled that a state statute providing for the sale of land to the state by operation of law for nonpayment of taxes applied to the terminated Indian and the property at issue.

### B. *The Majority's Decision Conflicts With Decisions Of This Court And Of Other Courts Of Appeals Which Hold That State Statutes Of Limitations Begin To Run Against Indians Once They No Longer Hold A Special Legal Status Under Federal Law.*

This Court long ago established that state statutes of limitations and related equitable doctrines of repose begin to run against Indians once their special status under federal law is gone. In *Schrimpscher* v. *Stockton* (*"Schrimpscher"*)[29] this Court held that an action by Wyandotte Indians to recover land was barred by state statutes of limitations, rejecting the argument that state statutes of limitations do not run against Indians. In-

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[27] United States v. Heath (*"Heath"*), 509 F.2d 16, 19 (9th Cir. 1974). In *Heath*, a Klamath Indian argued that she had been erroneously charged with murder under a federal statute applying to crimes committed by Indians because the Klamath termination act had rendered the statute inapplicable to her. The Ninth Circuit agreed that termination had removed her from the category of persons covered by that act, but found another basis for jurisdiction.

[28] Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981).

[29] Schrimpscher v. Stockton (*"Schrimpscher"*), 183 U.S. 290 (1902).

stead, the Court ruled that state law—including the statutes of limitations—had become applicable because of a treaty containing language which is substantially the same as Section 5 of the Catawba termination act. The Catawba act directs that "the laws of the several states shall apply to them in the same manner they apply to other[s]." The treaty provided that the Wyandotte Indians "shall in all respects be subject to the laws of the United States, and of the Territory of Kansas, in the same manner as other citizens of said Territory. . . ." After the removal of any federal restraint upon the alienation of the Indians' land, this Court held that the language of the treaty caused the state statutes of limitations to begin to run.[30]

The Ninth and Tenth Circuit Courts of Appeals have properly followed *Schrimpscher* and *Dillon* v. *Antler Land Co.*,[31] Indian land was transferred in violation of a federal restriction on alienation. After the transfer, Congress removed the restriction and directed that state law apply. The Ninth Circuit held that the state statute of limitations began to run at the time state law was made applicable, and barred the claims. Similarly, in *Dennison* v. *Topeka Chambers Industrial Development Corp.*[32] the Tenth Circuit held that the state statute of limitations barred a claim that Indian property had been conveyed in violation of federal restrictions against alienation. The court declared that the statute of limitations began

[30] *Id.* at 297. *See also* Dickson v. Luck Land Co., 242 U.S. 372 (1917). Similarly, in Felix v. Patrick (*"Felix"*), 145 U.S. 317 (1892), this Court held that once an Indian was able to sue on her own behalf and was no longer subject to special restrictions, laches began to run against her.

[31] Dillon v. Antler Land Co. (*"Dillon"*), 341 F. Supp. 734 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975).

[32] Dennison v. Topeka Chambers Indus. Dev. Corp. (*"Dennison"*), 527 F. Supp. 611 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984).



to run once federal restrictions on transfer were removed and state law became applicable.

The decisions of this Court and of the Ninth and Tenth Circuits recognize that any Indian immunity from state statutes of limitations is dependent upon special legal status under federal law. The Fourth Circuit majority, in contrast, refused to acknowledge that any Indian immunity from state law defenses such as statutes of limitations is a privilege conferred only by a special legal status under federal law and is subject to termination. Instead, the opinion mistakenly applied *Menominee Tribe of Indians* v. *United States* (*"Menominee"*)[33] to this case. The *Menominee* decision addressed whether Congress had intended by a termination act to abrogate a *treaty* right, which the Menominees held under a treaty with the United States and which they had never conveyed away. The Catawbas, in contrast, never had any treaty-based right to be free from the operation of state law, and made a voluntary sale of land held under a treaty with Great Britain which in no way prohibited the sale. *Menominee* is, therefore, wholly inapplicable.

### C. *The Majority's Construction Of The Statute Conflicts With This Court's Direction That The Language Of A Statute Is The Best Evidence Of Congressional Intent And Misstates The Canons Of Construction For Statutes Affecting Indians.*

This Court has repeatedly declared that the aim of a court in construing a statute must be to determine and give effect to the intent of the legislative body that enacted the legislation.[34] The language of the statute is

[33] Menominee Tribe v. United States (*"Menominee"*), 391 U.S. 404 (1968).

[34] *E.g.*, United States v. First National Bank, 234 U.S. 245 (1914); Adams v. Morton, 581 F.2d 1314, 1320 (9th Cir. 1978), *cert. denied sub nom.* Gros Ventre Tribe v. United States, 440 U.S. 958 (1979) ("The court's first duty in construing the statute is to effectuate the expressed intent of Congress.")

the primary evidence of congressional intent,[35] and where that language is plain a court may not alter its meaning by resort to canons of construction for ambiguous statutes.[36] If a court finds it necessary to go beyond the statute itself to understand what Congress intended, it must examine the surrounding circumstances.[37] Such an examination must explore the entire context, not selected portions of the legislative history,[38] and must ultimately be focused on the intent of the legislature at the time the legislation was enacted.[39] A court cannot rewrite a congressional act by its "interpretation." [40]

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[35] *E.g.*, Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978); United States v. Ray, 488 F.2d 15, 18 (10th Cir. 1973) ("It is a cardinal tenet of statutory construction that statutes are to be construed to effectuate the intent of the enacting body, and that in construing a statute, the court first looks to the language of the statute."); Hodgson v. Mauldin, 344 F. Supp. 302, 307 (N.D. Ala. 1972), *aff'd sub nom.* Brennan v. Mauldin (*"Mauldin"*), 478 F.2d 702 (5th Cir. 1973).

[36] *Mauldin*, 344 F. Supp. 302, 307 (N.D. Ala. 1972).

[37] *E.g.*, Leo Sheep Co. v. United States, 440 U.S. 668 (1979); Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975).

[38] Solem v. Bartlett, —— U.S. ——, 104 S.Ct. 1161 (1984); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1933). *Accord*, United Shoe Workers, AFL-CIO v. Bedell, 506 F.2d 174, 179 (D.C. Cir. 1974).

[39] Andrus v. Glover Constr. Co., 446 U.S. 608, 619 (1980), quoting DeCoteau v. Dist. County Court, 420 U.S. 425, 447 (1975). *See also* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945) (subsequent history omitted). *Accord*, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943).

[40] United States v. Hoodie, 588 F.2d 292, 295 (9th Cir. 1978). In rejecting the district court's determination that assimilationist legislation had been implicitly repealed by pro-Indian changes in public policy, the appellate court stated:

> [I]t is apparent that the district court was guided largely by its perception that Congress has become increasingly solicitous of Indian rights and that its holding would favor such rights.



The majority's decision violates every one of these well-established principles of statutory construction. Instead of focusing on the explicit language of the act, the majority opinion begins with, and relies upon, a serious misstatement of the law concerning the construction of ambiguous statutes involving Indians. The opinion declares that statutes that affect Indian tribes "should not be construed to the Indians' prejudice." [41] That is not the law. Special canons of construction favoring Indians *only* come into play if, after examination of the language of the statute to be construed, the legislative history, administrative interpretation and the full context, it is still uncertain what Congress intended.[42] As this Court said only last term in *Rice* v. *Rehner*:

> [W]e have consistently refused to apply such a canon of construction [favoring Indians] when application would be tantamount to a formalistic disregard of congressional intent.[43]

In this case there is no uncertainty. The statute directs that state law shall apply to the Catawbas, and

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> In another context, however, the Supreme Court [has] admonished:
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> > [A] statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." [Citations omitted.]

[41] Appendix, Ex. B, p. 13a.

[42] *E.g.*, Lower Brule Sioux Tribe v. United States, 712 F.2d 349, 352 (8th Cir. 1983) ("[A]n examination of the legislative history and circumstances surrounding the enactment of a statute may reveal Congressional intent and resolve the ambiguity, obviating resort to these rules.").

[43] Rice v. Rehner (*"Rice"*), —— U.S. ——, 103 S.Ct. 3291, 3302 (1983). Similarly, *see* Escondido Mut. Water Co. v. LaJolla (*"Escondido"*), —— U.S. ——, 104 S.Ct. 2105, 2110 (1984) ("[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses. . . .").

legislative history confirms that the purpose of the act was to give the Catawbas the same legal status as others.[44]

The majority refused to give effect to the plain language of Section 5 of the act, which specifies, "the laws of the several States shall apply to them [the Catawbas] in the same manner [as to others]." Instead, they concluded that "The 1959 Act neither prohibits nor authorizes the application of state law . . . ."

The majority attempted to justify this contradiction on the basis of Section 6 of the Catawba termination act which provides "that nothing in the Act shall affect the rights, privileges, or obligations of the Tribe *under the laws of South Carolina.*" [45] The majority suggested that Section 6 somehow eliminated the command in Section 5 that state law shall apply to the Catawbas. That construction is wrong for three reasons. First, it renders meaningless the explicit and unqualified directive in Section 5 that state law shall apply to the Catawbas. The customary rule of statutory construction is to avoid an interpretation that renders a portion of the statute meaningless.[46] Second, the majority confused special status under state law,[47] which was preserved by Section 6, with

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[44] As the dissenting judges below pointed out:

> [T]he central purpose of the Catawba Act was to terminate federal responsibility to the Tribe and its members. Partial termination was specifically rejected by the bill's sponsor . . . . [T]he plain and far-reaching language of the Act clearly reflects congressional intent to terminate any special federal status the Catawbas may previously have held and to put them on an equal footing with other citizens.

Appendix, Ex. C, p. 25a.

[45] Appendix, Ex. B, p. 18a (emphasis supplied).

[46] *See, e.g.*, Gen. Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 778 (5th Cir. 1968).

[47] The Catawbas still retain approximately 630 acres which have been held in trust for them by the State of South Carolina since 1842. The state has borne responsibility for this property and has also appropriated monies for the maintenance and support of the Catawbas over the years. Section 6 both preserved any special relationship between the Catawbas and the state and assured that the Catawbas could bring claims under state law relating to that relationship.



special status under federal law (such as any federally-based immunity from state law defenses), which was eliminated by Section 5 of the act. Section 6 only speaks of, and preserves, any special rights under *state* law, *not federal* law. Thus, Section 6 is irrelevant to questions concerning the Catawbas' status under federal law. Third, even if Section 6 somehow superseded Section 5 of the act, by its language Section 6 subjects the Catawbas to the "obligations" of South Carolina law. South Carolina obligates all its citizens to bring claims within the statute of limitations period.

The majority also read into Section 6 an intent to preserve this claim under federal law by referring to a single expression by the Catawbas of a desire that any claim they might have against the State of South Carolina not be affected.[48] The majority concluded that such a desire somehow resulted in the preservation of a federal Nonintercourse Act claim against all public and private present owners of the land. Ironically, in the district court the respondent argued that Congress was aware only of a possible state law claim that the State had not fully performed the terms of the 1840 treaty. The provisions of Section 6 that the Catawbas' rights and obligations under state law were not affected by the Catawba termination act was an appropriate response by Congress.

What Congress did not do was to preserve any federal claim such as a Nonintercourse Act claim. Congress knew how to preserve federal claims when it desired to do so and demonstrated its ability in other termination acts passed before and after the Catawba termination act.[49] It did not do so here.

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[48] This expression by the Catawbas was made prior to the drafting of the legislation. More significant is the Catawbas' vote to accept the legislation after it was enacted without reference to any claim under federal law.

[49] *See, e.g.*, 25 U.S.C. §§ 677r, 706 and 976 (1976).

In sum, there is no internal inconsistency or ambiguity in the statute, and there is no justification for construing the Catawba termination act to mean something different from what it plainly says in Section 5. State law applies to the Catawbas.

### D. *The Majority Interpreted The Meaning Of The Word "Indians" In A Way That Conflicts With This Court's Construction Of The Language Of Indian Statutes And Defies The Rules Of English Grammar.*

The majority conceded that enactment of 25 U.S.C. § 935 terminated the federal government's trust responsibilities to individual Catawbas. Paradoxically the majority opinion nevertheless concluded that the Catawbas as a group or tribe could still assert a federal trust responsibility relationship that would exempt them from state law defenses and would permit them to bring a Nonintercourse Act claim.[50]

No such distinction appears in the statute. To the contrary, the statute plainly applies to the Catawbas both individually and collectively. It provides:

> [T]he tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them. . . .[51]

The statute thus explicitly declares that neither the tribe nor its members are entitled to special services or the protection of special statutes based upon their status *as Indians*, using the term "Indians" interchangeably with the terms "tribe and its members." [52]

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[50] Appendix, Ex. B, p. 23a.

[51] 25 U.S.C. § 935 (1976).

[52] Congress' use in Section 935 of the uniform shorthand reference to "all statutes of the United States that affect Indians because of their status as Indians" was the natural method of insuring that



The majority's construction of the statute as somehow exempting the Catawbas collectively from the effects of the statute is not even grammatically possible. The second sentence of Section 5 of the Catawba termination act is a compound sentence composed of three independent principal clauses. "The tribe and its members" are the subject of the sentence, and its provisions set forth what happens to them, as the subject of the sentence. References to "them" are references to the subject of the sentence, "the tribe and its members." In simplified form, the sentence reads:

> [T]he tribe and its members shall not be entitled to any of the special services . . . for Indians because of their status as Indians, all [federal Indian] statutes shall be inapplicable to them; and [state law] shall apply to them . . . .

The statute's use of the term "them" thus is not and cannot be limited to individual members of the tribe.

Perhaps because the plain language of the Catawba termination act contradicts their construction of the act, the majority attempted to bolster their construction by asserting that the 1834 Nonintercourse Act uses the term "Indians" only to refer to individual Indians and not Indian tribes. They then concluded that the Congress that passed the 1959 Catawba termination act must have known of and employed the same purported distinction.[53]

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*every* statute relating to Indian affairs was no longer applicable to the tribe and its members. It is a person's status as a member of a tribe, not his racial or anthropological heritage, which qualifies that person for "status as [an] Indian," United States v. Antelope, 430 U.S. 641, 645-47, and n.7 (1977), and it is from that status that all federal legislative power springs. *Id.*, and art. I, § 8 of the Constitution of the United States. Rendering inapplicable all statutes of the United States passed pursuant to that power and as a result of that status ensures that the full range of United States statutes were no longer applicable to "the tribe and its members."

[53] Appendix, Ex. B, pp. 20a-21a.

In fact there is no such distinction in the Nonintercourse Act. The Nonintercourse Act, 25 U.S.C. § 177, uses the term "Indians" interchangeably with the terms "Indian nation" and "tribe of Indians."[54] Moreover, in *Wilson* v. *Omaha Indian Tribe*[55] this Court declared that "Indians" and "Indian tribes" mean the same thing in the Trade and Intercourse Act, of which the Nonintercourse Act is a part. Thus, neither English grammar nor the purported distinction in the language of the Nonintercourse Act permits the majority's construction of the Catawba termination act.

### E. *The Majority Substituted Their Judgment For That Of Congress, In Conflict With Decisions Of This Court And Other Courts Of Appeals.*

The majority's opinion conflicts with yet another series of decisions by this Court. This Court has repeatedly held that Congress, and Congress alone, has paramount power to create or to end any special legal status In-

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[54] The first sentence of this statute requires that a land transfer by any "Indian nation or tribe of Indians" be conducted pursuant to treaty. The second sentence imposes a fine on any person who negotiates a transfer from an Indian nation or tribe without federal authority. The third sentence, however, permits a representative of a state, accompanied by a federal commissioner, to negotiate a transfer of land by a treaty "with Indians" and to compensate "the Indians." The third sentence modifies the provisions of the first and second sentences for dealing with Indian tribes, describing the one circumstance in which a state may treat with a tribe. It merely substitutes the term "Indians" for "tribes." Indeed, the third sentence only makes sense if the term "Indians" means "Indian tribes," since the federal government did not negotiate treaties with individual Indians, and since Indians commonly held land collectively as a tribe, not as individuals. Thus, contrary to the assertion of the majority opinion, the Nonintercourse Act uses these words interchangeably.

[55] Wilson v. Omaha Indian Tribe, 442 U.S. 653, 665-66 (1979) (subsequent history omitted). *See also* Mohegan Tribe v. Connecticut, 638 F.2d 612, 627 n.18 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).



dians may enjoy under federal law.[56] As the Court declared in *United States* v. *Waller* ("*Waller*"):

> Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection.[57]

Similarly, this Court said in *Rice* v. *Rehner* less than two years ago:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.[58]

Indeed, this Court's decision in *Affiliated Ute*,[59] affirmed the Tenth Circuit's position in *Reyos*:[60]

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[56] *See, e.g.*, United States v. Antelope, 430 U.S. 641, 646 (1977); United States v. Seminole Nation, 299 U.S. 417, 428-29 (1937); United States v. Nice, 241 U.S. 591, 598 (1916); United States v. Kagama, 118 U.S. 375 (1886).

[57] United States v. Waller, 243 U.S. 452, 459 (1917).

[58] *Rice v. Rehner* ("*Rice*"), —— U.S. ——, 103 S.Ct. 3291, 3295 (1983), *quoting* United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis added by the Court in *Rice*). *See also* DeCoteau v. Dist. County Court, 420 U.S. 425 (1975); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Martone, *American Indian Tribal Self-Government In the Federal System: Inherent Right or Congressional License?*, 51 Notre Dame L.Rev. 600, 611 (1976).

Other recent decisions by this Court are in accord. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) and Kake Village v. Egan, 369 U.S. 60 (1962) this Court emphasized: (1) that historical traditions of Indian immunity from state law have diminished in importance since the late nineteenth century, and (2) that what is crucial in determining whether Indians are immune from state law is whether federal law has forbidden the application of state law to them. In this case Congress has not only *not forbidden* the application of state law to the Catawbas, but has *affirmatively directed that state law shall apply.*

[59] *Affiliated Ute*, 406 U.S. 128, 144-50 (1972).

[60] *Reyos*, 431 F.2d 1337 (10th Cir. 1970).

> [I]t is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination.[61]

Despite this Court's directives, the majority reached a result that is contrary to the explicit language of the Catawba termination act declaring that state law shall apply to the Catawbas and that federal Indian statutes and special Indian services shall not. By ignoring the language of the act, substantial portions of the legislative history,[62] administrative interpretation,[63] and con-

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[61] *Reyos*, 431 F.2d at 1343. This Court also has cited the Ninth Circuit's decision in *Heath* with approval in United States v. Antelope, 430 U.S. 631, 647 n.7 (1977). In *Heath*, the Ninth Circuit plainly stated:

> The Klamath Termination Act . . . was intended to end the special relationship that had historically existed between the Federal Government and the Klamath Tribe. While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists.

*Heath*, 509 F.2d at 19.

[62] For example, the sponsor of the bill that became the Catawba termination act firmly announced in congressional debate:

> It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.

105 Cong. Rec. 5462 (1959).

In hearings on the legislation he reiterated:

> They need it [the legislation] to put them on the same status as other citizens with the same responsibilities.

Hearings on H.R. 6128 before the House Committee on Interior and Insular Affairs, 86th Cong., 1st Sess. 10 (1959) (unpublished).

[63] For example, in supporting the legislation, the Department of the Interior and its Bureau of Indian Affairs stated that one of the effects of the bill would be to "discontinue their [the Catawbas'] special Indian relations with the Federal government." Department of the Interior, BIA Press Release (June 10, 1959); (Def. Ex. 23) (Appeals Record at 510). *See also* Def. Exs. 28, 30 (Appeals Record



temporary federal Indian policy,[64] the majority substituted *its* preferred form of a Catawba termination act for the statute enacted by Congress. As Judge Hall declared, writing in dissent:

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at 523, 524). The Office of the Solicitor of the Department of the Interior explained the termination act to the Catawbas in a 1959 letter:

> Section 5 invokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. . . . [T]he "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes" . . . . Nothing in the act prohibits those interested in organizing under State law to carry on any of the nongovernmental activities of the group.

Def. Ex. 29 (Appeals Record at 531).

Current regulation provides that groups of Indians who have been the subject of termination legislation cannot be recognized or treated as Indian tribes under federal law. 25 C.F.R. § 83.3(3) (1982). Instead, where a terminated group of Indians has sought to revive their special status under federal law, Congress has enacted legislation restoring that group to the status of an Indian tribe under federal law. *See, e.g.*, Paiute Indian Tribe of Utah Restoration Act, 25 U.S.C. §§ 761-768 (1980). The Catawbas have never been the subject of such "restoration" legislation and are still listed in the records of the Bureau of Indian Affairs as a terminated group of Indians. Def. Ex. 39 (Appeals Record at 551).

[64] It has been widely recognized that termination acts changed the legal status of the affected Indians. Federal Indian law specialist Charles F. Wilkinson described the purpose and effect of termination legislation:

> Termination, the official Federal Indian Policy from 1953 through the late 1960's may be defined simply as the cessation of the Federal-Indian relationship, whether that relationship was established through treaty or otherwise. The thrust was to eliminate the reservations and to turn Indian affairs over to the states. Indians would become subject to state control without any Federal support or restrictions. Indian land would no

> [T]he majority in this case has impermissibly substituted its own judgment for that of Congress. By doing so, it has succeeded in nullifying the clear mandate of the Catawba Act . . . .[85]

This Court should review and correct the majority decision because it rewrites the Catawba termination act, a clearly legislative function.

## CONCLUSION

The majority decision repeatedly and significantly conflicts with decisions by this Court and by other courts of appeals. Because the homes and businesses of thousands of innocent parties are at stake, and because the decision below also could create confusion and uncertainty as to the legal status of other Indians, this Court should now review and correct the decision below. Correction of the majority's errors a decade from now can never ameliorate years of real anguish for thousands of innocent landowners.

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longer be held in trust and would be fully taxable and alienable, just like non-Indian land in the states.

Wilkinson, The Passage of The Termination Legislation, in Final Report To The American Indian Policy Review Commission, in Task Force Ten, *Report On Terminated And Nonfederally Recognized Indians*, 1627-49 (October 1976, U.S. Gov't Printing Office).

[85] Appendix, Ex. C, p. 28a.



Respectfully submitted,

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA C. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

J.D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, S.C. 29602
(803) 242-6440
*Attorneys for C.H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, South Carolina 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

JAMES D. ST. CLAIR, P.C.*
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, Massachusetts 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
STATE OF SOUTH CAROLINA
Rembert Dennis Building
Columbia, South Carolina 29211
(803) 758-3970
*Attorneys for the State of South Carolina*

* Counsel Of Record For Each Petitioner

November 14, 1984

# APPENDIX

**EXHIBIT A**

**The Per Curiam Decision Of The Fourth Circuit Sitting En Banc**

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 82-1671

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CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina,
*Appellant,*

—v—

STATE OF SOUTH CAROLINA, RICHARD W. RILEY, as Governor of the State of South Carolina; COUNTY OF LANCASTER, and its COUNTY COUNCIL consisting of FRANCIS L. BELL as Chairman, FRED E. PLYLER, ELDRIDGE EMORY, ROBERT L. MOBLEY, BARRY L. MOBLEY, L. EUGENE HUDSON, LINDSAY PETTUS; CITY OF ROCK HILL, J. EMMETT JEROME, as Mayor, and its CITY COUNCIL consisting of MELFORD A. WILSON, ELIZABETH D. RHEA, MAXINE GILL, WINSTON SEARLES, A. DOUGLAS ECHOLS, FRANK W. BERRY, SR.; BOWATER NORTH AMERICAN CORPORATION; CATAWBA TIMBER CO.; CELANESE CORPORATION OF AMERICA; CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA; CRESENT LAND & TIMBER CORP.; DUKE POWER COMPANY; FLINT REALTY AND CONSTRUCTION COMPANY; HERALD PUBLISHING COMPANY; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION; ROCK HILL PRINTING & FINISHING COMPANY; RODDEY ESTATES, INC.; SOUTHERN RAILWAY COMPANY; SPRINGS MILLS INC.; J.P. STEVENS & COMPANY; TEGA CAY ASSOCIATES; WACHOVIA BANK AND TRUST COMPANY; ASHE BRICK COM-

PANY; CHURCH HERITAGE VILLAGE & MISSIONARY FELLOWSHIP; NISBET FARMS, INC.; C. H. ALBRIGHT; NED ALBRIGHT; J. W. ANDERSON, JR.; JOHN MARSHALL WI[illegible]KINS, II; JESSE G. ANDERSON; JOHN WESLEY AN[illegible]RSON; DAVID GOODE ANDERSON; W. B. ARDREY, JR. ELIZA BETH ARDREY GRIMBALL; JOHN W. ARDREY, ARDREY FARMS; F. S. BARNES, JR.; W. WATSON BARRON; WILSON BARRON; ARCHIE B. CARROLL, JR.; HUGH WILLIAM CLOSE; JAMES BRADLEY; FRANCIS LAY SPRINGS; LILLIAN CRANDEL CLOSE; FRANCIS ALLISON CLOSE; LEROY SPRINGS CLOSE; PATRICIA CLOSE; WILLIAM ELLIOTT CLOSE; HUGH WILLIAM CLOSE, JR.; ROBERT A. FEWELL; W. J. HARRIS; ANNIE F. HARRIS; T. W. HUTCHINSON; HIRAM HUTCHINSON, JR.; J. R. MCALHANEY; F. M. MACK, JR.; ARNOLD F. MARSHALL; J. E. MARSHALL, JR.; C. E. REID, JR.; WILL R. SIMPSON; JOHN S. SIMPSON; ROBERT F. SIMPSON; THOMAS BROWN SNODGRASS, JR.; JOHN M. SPRATT; MARSHALL E. WALKER; HUGH M. WHITE, JR.; JOHN M. BELK; JANE NISBET GOODE; R. N. BENCHER; W. O. NISBET, III; PAULINE B. GUNTER; J. MAX MINSON; W. A. MCCORKLE; MARY MCCORKLE; WILLIAM O. NISBET; EUGENIA NISBET WHITE; MARY NISBET PURVIS; E. N. MARTIN; ROBERT M. YODER,

*Appellees.*

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Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Joseph P. Wilson, Senior District Judge, Western District of Pennsylvania, sitting by designation. (C/A 80-2050)

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Argued June 4, 1984 Decided August 17, 1984

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Before WINTER, Chief Judge, WIDENER, HALL, PHILLIPS, MURNAGHAN, and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge. (en banc)*

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Don B. Miller and Jean H. Toal (Native American Rights Fund; Belser, Baker, Barwick, Ravenel, Toal & Bender; Robert M. Jones; Mike Jolly and Richard Steele on brief) for appellant; John C. Christie, Jr., J. D. Todd, Jr., James D. St. Clair (J. William Hayton, Stephen J. Landes, Lucinda O. McConathy, Bell, Boyd & Lloyd; Michael J. Giese, Gwendolyn Embler, Leatherwood, Walker, Todd & Mann; Dan M. Byrd, Jr., Mitchell K. Byrd, Byrd and Byrd; James L. Quarles, III; William F. Lee; David H. Erichsen; Hale and Dorr; T. Travis Medlock, Attorney General, Kenneth P. Woodington, Assistant Attorney General for the State of South Carolina on brief) for appellees.

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PER CURIAM:

The judgment of the district court is reversed, and this case is remanded for further proceedings for reasons stated in the opinion of the panel. Catawba Indian Tribe of South Carolina v. South Carolina, 718 F.2d 1291 (4th Cir. 1983). Judge Widener, Judge Hall, and Judge Phillips, dissenting, would affirm the judgment of dismissal for the reasons stated in Judge Hall's dissent to the panel opinion. 718 F.2d at 1301-03.

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* Judge Russell, Judge Ervin, and Judge Chapman did not participate in the hearing or the decision of this appeal.

**EXHIBIT B**

**The Panel Majority Opinion**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 82-1671

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CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina,
*Appellant,*

—v—

STATE OF SOUTH CAROLINA, RICHARD W. RILEY, as Governor of the State of South Carolina; COUNTY OF LANCASTER, and its COUNTY COUNCIL consisting of FRANCIS L. BELL as Chairman, FRED E. PLYLER, ELDRIDGE EMORY, ROBERT L. MOBLEY, BARRY L. MOBLEY, L. EUGENE HUDSON, LINDSAY PETTUS; CITY OF ROCK HILL, J. EMMETT JEROME, as Mayor, and its CITY COUNCIL consisting of MELFORD A. WILSON, ELIZABETH D. RHEA, MAXINE GILL, WINSTON SEARLES, A. DOUGLAS ECHOLS, FRANK W. BERRY, SR.; BOWATER NORTH AMERICAN CORPORATION; CATAWBA TIMBER CO.; CELANESE CORPORATION OF AMERICA; CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA; CRESENT LAND & TIMBER CORP.; DUKE POWER COMPANY; FLINT REALTY AND CONSTRUCTION COMPANY; HERALD PUBLISHING COMPANY; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION; ROCK HILL PRINTING & FINISHING COMPANY; RODDEY ESTATES, INC.; SOUTHERN RAILWAY COMPANY; SPRINGS MILLS INC.; J.P. STEVENS & COMPANY; TEGA CAY ASSOCIATES; WACHOVIA BANK AND TRUST COMPANY; ASHE BRICK COMPANY; CHURCH HERITAGE VILLAGE & MISSIONARY FELLOWSHIP; NISBET FARMS, INC.; C. H. ALBRIGHT; NED ALBRIGHT; J. W. ANDERSON, JR.; JOHN MARSHALL WILKINS, II; JESSE G. ANDERSON; JOHN WESLEY ANDERSON; DAVID GOODE ANDERSON; W. B. ARDREY, JR.; ELIZA BETH ARDREY GRIMBALL; JOHN W. ARDREY, ARDREY FARMS; F. S. BARNES, JR.; W. WATSON BARRON; WILSON BARRON; ARCHIE B. CARROLL, JR.; HUGH WILLIAM CLOSE; JAMES BRADLEY; FRANCIS LAY SPRINGS; LILLIAN CRANDEL CLOSE; FRANCIS ALLISON CLOSE; LEROY SPRINGS CLOSE; PATRICIA CLOSE; WILLIAM ELLIOTT CLOSE; HUGH WILLIAM CLOSE, JR.; ROBERT A. FEWELL; W. J. HARRIS; ANNIE F. HARRIS; T. W. HUTCHINSON; HIRAM HUTCHINSON, JR.; J. R. MCALHANEY; F. M. MACK, JR.; ARNOLD F. MARSHALL; J. E. MARSHALL, JR.; C. E. REID, JR.; WILL R. SIMPSON; JOHN S. SIMPSON; ROBERT F. SIMPSON; THOMAS BROWN SNODGRASS, JR.; JOHN M. SPRATT; MARSHALL E. WALKER; HUGH M. WHITE, JR.; JOHN M. BELK; JANE NISBET GOODE; R. N. BENCHER; W. O. NISBET, III; PAULINE B. GUNTER; J. MAX MINSON; W. A. MCCORKLE; MARY MCCORKLE; WILLIAM O. NISBET; EUGENIA NISBET WHITE; MARY NISBET PURVIS; E. N. MARTIN; ROBERT M. YODER,
*Appellees.*

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Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Joseph P. Wilson, Senior District Judge, Western District of Pennsylvania, sitting by designation.

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Argued March 8, 1983 Decided October 11, 1983

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Before HALL and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

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Don B. Miller, Native American Rights Fund; Jean H. Toal (Belser, Baker, Barwick, Ravenel, Toal & Bender; Robert M. Jones; Mike Jolly and Richard Steele on brief) for appellant; James D. St. Clair (James L. Quarles, III, William F. Lee, David H. Erichsen, Hale and Dorr on brief) and [illegible]n C. Christie, Jr. (J. William Hayton, Stephen J. Landes, Lucinda O. McConathy, Bell, Boyd & Lloyd; J. D. Todd, Jr., Michael J. Giese, Gwendolyn Embler, Leatherwood, Walker, Todd & Mann; Dan M. Byrd, Jr., Mitchell K. Byrd, Byrd and Byrd; T. Travis Medlock, Attorney General, Kenneth P. Woodington, Assistant Attorney General, State of South Carolina on brief) for appellees.

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BUTZNER, Senior Circuit Judge:

The Catawba Indian Tribe of South Carolina appeals from the district court's grant of summary judgment in favor of South Carolina and 76 other defendants.[1] The court held that the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. §§ 931-38, and the South Carolina statute of limitations, S.C. Code Ann. § 15-3-340 (Law. Co-op. 1976), barred the Tribe's claim to land allegedly granted to the state in 1840 in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177. We reverse and remand for further proceedings on the merits of the Tribe's claim. We hold only that the grant of summary judgment cannot be sustained. For the purpose of ruling whether summary judgment was appropriate, we have

[1] For convenience, we will refer to the appellees collectively as South Carolina.



assumed without deciding, as did the district court, that disputed facts on which the Tribe relies are true.

I

Long before English and European settlers came to North America, the Catawba Tribe occupied its aboriginal territory in what is now parts of North and South Carolina. In the 1760 Treaty of Pine Tree Hill between the Tribe and the King of England's Superintendent for Indian Affairs, the Tribe relinquished its aboriginal territory in exchange for being quietly and permanently settled on a 144,000 acre tract.

The Tribe protested that England had failed to carry out the terms of the 1760 treaty and reasserted a right to its aboriginal territory. In 1763, the Tribe entered into the Treaty of Augusta with the King's representatives. In exchange for relinquishing its aboriginal territory, the Tribe again agreed to be settled on a 144,000 acre tract in South Carolina.[2] England fulfilled the terms of this treaty.

After the Revolutionary War, South Carolina initially recognized the Treaty of Augusta. There was increasing

[2] The 1763 Treaty of Augusta provides in relevant part:

> And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendent on their Parts promise and engage that the aforesaid survey shall be compleaed and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

XI *Colonial Records of North Carolina*, at 201-02. The tract lies at the northern border of South Carolina in York, Lancaster, and perhaps Chester counties. The precise boundaries are uncertain because of the deficiencies of the survey.

pressure from settlers, however, who wished to move onto the Tribe's land. By the 1830s, nearly all of the Tribe's land had been leased to non-Indians pursuant to state statutes. South Carolina then began to negotiate with the Tribe to purchase its land. These efforts culminated in 1840 in the Treaty of Nation Ford in which the Tribe gave up the 144,000 acres granted by the treaties of 1760 and 1763. In exchange South Carolina promised to spend $5,000 to acquire a new reservation, $2,500 cash in hand, and yearly payments of $1,500 for nine years. The United States was not a party to and did not participate in the Treaty of Nation Ford.

In 1842 South Carolina purchased a 630 acre tract for $2,000 as a new reservation for the Tribe. This land continues to be held in trust for the Tribe by South Carolina as an Indian reservation.[3]

In the early 1900s, the Tribe sought to have the federal government assume responsibility for its welfare. These efforts resulted in a 1943 Memorandum of Understanding between the Tribe, the federal government, and South Carolina.[4] In accordance with this agreement, the state purchased 3,434 acres of land and conveyed it in trust for the Tribe to the United States. In addition, the United States agreed to provide economic development

[3] *See* Op. Att'y Gen. S.C., No. 3988 (Mar. 6, 1975).

[4] The federal government refused to include a clause in the 1943 Memorandum that would have specifically extinguished any claims the Tribe might have based on the 1760 and 1763 treaties. In a "formal expression of opinion," the solicitor of the Department of the Interior stated that elimination of the clause was "most desirable in that it avoids a procedure of doubtful legality which would have consisted in using a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." Memorandum for the Commissioner of Indian Affairs from the Solicitor of the Department of the Interior, undated, at 3. *See also* Letter of the Assistant Commissioner of Indian Affairs to the State Auditor of South Carolina, dated Aug. 28, 1941.



assistance to the Tribe, and the Tribe agreed to organize to conduct its business on the basis of the federal government's recommendations.

With the advent of the termination era in 1953,[5] the federal government designated the Tribe as a likely candidate for the withdrawal of federal services. Federal assistance during the previous decade had been minimal. In addition, members of the Tribe desired an end to federal restrictions on alienation in order to facilitate financing for farm operations, homes, and improvements on the 3,434 acre reservation.

Efforts at securing the withdrawal of federal services began in earnest in 1958 and resulted in the enactment in 1959 of the Catawba Indian Tribe Division of Assets Act.[6] The Act became effective in 1962, and the 3,434

[5] "Termination era" refers to the federal policy from 1953 to the mid-1960s of ending the federal government's supervisory responsibilities for Indian tribes. *See* F. Cohen, *Handbook of Federal Indian Law* 152-80 (R. Strickland ed. 1982) [cited as Cohen, *Federal Indian Law* (1982)].

[6] 73 Stat. 592, 25 U.S.C. §§ 931-938. The Act provides for the preparation of a tribal membership roll, the tribal council's designation of sites for church, park, playground, and cemetery purposes, and the division of remaining assets among the enrolled members of the tribe.

Sections 935 and 936, with which this litigation is particularly concerned, provide:

> § 935. The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.

acre reservation, which had been acquired pursuant to the 1943 Memorandum of Understanding, was distributed among tribal members, either as land or as proceeds from its sale.

II

In 1980 the Tribe brought suit against South Carolina and the other defendants. It claims it acquired a vested property right in the 144,000 acre reservation granted the Tribe in the 1760 and 1763 treaties and that upon our nation's independence these lands came within the scope of the federal program for the protection of Indian lands. Consequently, the Tribe asserts the 1840 Treaty of Nation Ford, whereby South Carolina purported to acquire the 144,000 acres, is void because the United States did not participate in or consent to the alienation of the Tribe's reservation as required by the Indian Nonintercourse Act.[7] The Tribe seeks to be restored to possession of its reservation as well as trespass damages for the entire period of its dispossession.

South Carolina argues the 1959 act of Congress bars the Tribe's claim. It contends that § 935 [8] terminates the Tribe, ends any trust relationship between the Tribe and the federal government, and makes state law applicable

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Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

§ 936. Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina.

[7] 25 U.S.C. § 177 (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138). The Act states in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Transactions in violation of the Nonintercourse Act are void. Cohen, *Federal Indian Law* 512 (1982).

[8] *See supra* note 6.



to the Tribe's claim. The state also argues that the legislative history supports this interpretation and indicates Congress intended to ratify the 1840 Treaty.

The Tribe counters by arguing that § 935 on its face only terminates federal services to the tribe and makes state law applicable to the individual Indians, not to tribal claims. Furthermore, it argues the text and legislative history indicate Congress only intended to end the federal relationship with the Tribe created by the 1943 Memorandum of Understanding and did not intend to affect any tribal claims arising out of the 1760 and 1763 treaties.

On cross-motions for summary judgment, the district court assumed, without deciding, that prior to 1959 the Tribe was a "tribe" within the meaning of the Nonintercourse Act; that the 1760 and 1763 treaties granted the Tribe some interest in the land in issue; that the land was covered by the Nonintercourse Act; and that prior to 1959 the United States neither approved, ratified, nor consented to the 1840 Treaty of Nation Ford. The court also assumed that a trust relationship existed between the Tribe and the United States at least up to 1959.

The district court granted South Carolina's motion for summary judgment. It held that the 1959 Act extinguished the Tribe's existence; ratified the 1840 treaty; terminated the trust relationship between the Tribe and the federal government; and made state law applicable to the Tribe's claim. It then held that the state statute of limitations barred the claim.

III

In Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68 (1974), the Supreme Court reiterated the nation's policy with respect to lands occupied by Indians:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied

by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. . . . The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day. (footnote omitted)

To establish a *prima facie* case for a violation of the Nonintercourse Act, the Tribe must prove four elements: (1) that it is or represents an Indian tribe within the meaning of the Nonintercourse Act; (2) that the land in issue is covered by the Nonintercourse Act as tribal land; (3) that the United States has never approved or consented to the alienation of the tribal land; and (4) that the trust relationship between the United States and the tribe, established by coverage of the Nonintercourse Act, has never been terminated or abandoned. Epps v. Andrus,



611 F.2d 915, 917 (1st Cir. 1979); Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 803 (D.R.I. 1976).

The district court assumed these elements existed until the enactment of the Catawba Indian Tribe Division of Assets Act of 1959. Thus, the principal issue is whether the 1959 Act precludes the Tribe from relying on the Nonintercourse Act and subjects its claim to the South Carolina statute of limitations.

## IV

In considering the effect of the 1959 Act on the Tribe's claim, we must be mindful of the canons of construction the Supreme Court has enunciated for use in construing statutes that affect Indian tribes. Such statutes should not be construed to the Indians' prejudice. Congressional intent to abrogate or modify a treaty right must be clearly expressed, and doubtful expressions are to be resolved in favor of the Indians. *See* Antoine v. Washington, 420 U.S. 194, 199-200 (1975); Mattz v. Arnett, 412 U.S. 481, 504-05 (1973); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1963).

Both sides present plausible arguments to support their reading of the 1959 Act in which they rely in part on the Act's legislative history in order to discern Congress's intent. We conclude that it is appropriate to examine the legislative history and surrounding circumstances in order to construe the Act properly. *See* Mattz v. Arnett, 412 U.S. 481, 505 (1973).

The process toward passage began in late 1958 when Bureau of Indian Affairs officers met tribal members. An Indian expressed concern about the Tribe's treaty reservation claim against South Carolina, but the Bureau officer assured him "that any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government" for the distribution

of tribal assets.[9] In January 1959, the Tribe adopted a resolution, drafted by the Bureau, which requested the removal of federal restrictions on their 3,434 acre reservation. The resolution specifically conditioned tribal support of division of assets legislation on leaving the treaty reservation claim unaffected:

> Now, therefore, BE IT RESOLVED that, in view of the benefits that will accrue to all of the members of the tribe by the equitable distribution of the tribal assets, its General Counsel . . . hereby formally requests [our Congressman] to introduce and secure passage of appropriate legislation to accomplish the removal of Federal restrictions against the alienation of Catawba land, in York County, South Carolina, so that it can be patented, . . . *and that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe.* (emphasis added)

The Congressman then requested the Bureau to draft legislation "to accomplish the desires set forth in the Resolution." [10] The Congressman presented the draft bill to the Tribe two months later, again saying it "carr[ied] out the intent of the resolution." [11] The Tribe then approved the bill and it was introduced in Congress on April 7, 1959.

[9] Memorandum of Jan. 30, 1959, from a Program Officer to the Chief of the Branch of Tribal Programs of the Bureau of Indian Affairs, at 7.

For a number of years, South Carolina and the Tribe have unsuccessfully negotiated to settle the Tribe's claim. *See, e.g.*, Letter from the Assistant Commission of the Bureau of Indian Affairs to the Chief of the Catawba Tribe, dated Feb. 3, 1937; Letter from the Assistant Commissioner of the Bureau of Indian Affairs to the State Auditor of South Carolina, dated Feb. 3, 1937. *See generally* U.S. Comm'n on Civil Rights, *Indian Tribes* 117-18 (1981).

[10] Letter from the Congressman to the Legislative Associate Commissioner of the Bureau of Indian Affairs, dated January 26, 1959.

[11] Minutes of Meeting of the Catawba Council held March 28, 1959, at 2.



The House and Senate committee reports on the bill are similar. Both state: "The purpose of [the bill] is to provide for the division of the assets of the Catawba Indian Tribe of South Carolina among its enrolled members in approximately equal shares." [12] In addition, the reports quote from a Department of the Interior recommendation which states:

> In accordance with the [1943] memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and . . . conveyed the land to the United States in trust for the tribe. It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.[13]

The bill was signed by President Eisenhower on September 21, 1959, and became effective in 1962. At that time, the Department of the Interior informed the Tribe of the revocation of its constitution, the transfer of jurisdiction to the state, and the termination of the 1943 Memorandum of Understanding.[14]

Viewed in its entirety, we believe the legislative history of the 1959 Act fails to suggest any congressional intent to affect any claim the Tribe might have against South Carolina. Rather, the legislative history and text of the Act indicate it was intended only to end federal supervision and assistance arising out of the 1943 Memoran-

[12] S. Rep. No. 863, 86th Cong., 1st Sess. 1 (1959); H.R. Rep. No. 910, 86th Cong., 1st Sess. 1 (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2672.

[13] S. Rep. No. 863, 86th Cong., 1st Sess. 3 (1959); H.R. Rep. No. 910, 86th Cong., 1st Sess. 3 (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2673.

[14] *See* Letter from the Secretary of the Department of the Interior to the Chief of the Catawba Tribe, dated June 15, 1962.

dum of Understanding. Although the House and Senate reports show Congress was aware of the 1840 Treaty, there is no explicit or implicit indication of any desire to extinguish any tribal claims against South Carolina. In fact, the Act's history suggests a congressional intent not to affect any such claims. The Tribe conditioned introduction of the Act on leaving the treaty reservation claim unaffected, and the Act's congressional sponsor stated it was designed to accomplish the Tribe's desires as expressed in the tribal resolution.

We therefore cannot accept the district court's interpretation of the 1959 Act as ratifying the 1840 Treaty. The Act does not expressly ratify it. There also is no mention of the 1760 and 1763 Treaties, by which the Tribe received the 144,000 acres in issue. Thus, the district court's construction of the Act is contrary to the requirement that congressional intent to terminate a treaty reservation must be clear. *See* DeCoteau v. District County Court, 420 U.S. 425, 444 (1975).

## V

Essential elements of a cause of action under the Nonintercourse Act are proof that the complainant is an Indian tribe and that it has maintained a trust relationship with the federal government. The district court assumed that the Catawbas satisfied these requirements before 1959, but it concluded that the Division of Assets Act terminated the Tribe's existence. The court also held that the Act terminated the Tribe's trust relationship with the federal government with respect to the Nonintercourse Act. In support of the district court's decision, South Carolina emphasizes that the 1959 Act revoked the Tribe's constitution.

The authoritative commentary, Cohen, *Federal Indian Law* 815 (1982), explains the effect of termination on tribal status:



> Termination legislation did not literally terminate the existence of the affected tribes. Further, its effect was not necessarily to terminate all of the federal government's relationship with those tribes. Tribal powers can be extinguished only by clear and specific congressional action. Indian tribes can be recognized by the United States for some purposes and not for others. (footnotes omitted)

Cohen's explanation is fully supported by cases that have considered this issue. *See, e.g.*, Menominee Tribe of Indians v. United States, 388 F.2d 998, 1000-01 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968) (by implication); Kimball v. Callahan, 590 F.2d 768, 773-75 (9th Cir. 1979).

Revocation of the Tribe's constitution did not terminate the Tribe. The tribal constitution was adopted pursuant to 25 U.S.C. § 476 [15] and the 1943 Memorandum of Understanding. Its revocation is consistent with the termination of federal assistance arising out of that Memorandum. As we mentioned in note 4, *supra*, the federal government on advice of the Solicitor of the Department of Interior refused to include a clause in the 1943 Memorandum of Understanding that would have extinguished any claims the Tribe might have based on the 1760 and 1763 treaties. The constitution was adopted to implement the Memorandum of Understanding. Consequently, it would be illogical, and indeed ironic, to hold, as South Carolina urges, that Congress intended revocation of the constitution to defeat the same treaty claims that the

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[15] "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . ."

This provision was enacted in order to encourage revitalization of tribal self-government through the adoption of more formal governmental procedures. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973).

parties to the Memorandum of Understanding had refused to extinguish.

The Supreme Court has defined a "tribe" as a "body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ." Montoya v. United States, 180 U.S. 261, 266 (1901). The Court has applied this definition to bring within the scope of the Nonintercourse Act a tribe of Indians that did not have a federally recognized form of government. *See* United States v. Candelaria, 271 U.S. 432, 441-42 (1926). *See also* Cohen, *Federal Indian Law* 18 (1982) ("any continuing organization, however informal, would deny the abandonment of tribal existence"). Despite revocation of the tribal constitution, the Catawba Tribe continued as a body of Indians, united in a community under one leadership, and inhabiting a particular territory. Ind d, South Carolina to this date recognizes the Tribe's existence by continuing to hold a 630 acre reservation in trust for it.[16]

Any doubt about the effect of the 1959 Act on the Tribe's existence is put to rest by reference to its text. The Act provides for a final roll of the membership of the Tribe for the disposition of its assets. It authorizes the tribal council to designate any part of the Tribe's land that is to be set aside for church, park, playground, or cemetery purposes. 25 U.S.C. §§ 931 and 933. Furthermore, it provides that nothing in the Act shall affect the rights, privileges, and obligations of the Tribe under the laws of South Carolina. 25 U.S.C. § 936. Clearly, the Congress did not intend the Division of Assets Act of 1959 to end the Tribe's existence.

We also hold that the 1959 Act did not end the trust relationship between the Tribe and the federal govern-

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[16] *See supra* note 3 and accompanying text.



ment. The *res* of this trust is the Tribe's reservation, which was created by the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763 with the English Crown. When the Nonintercourse Act was enacted some 27 years later, these treaties were in effect. The Tribe's right of occupancy, conferred by the treaties, was honored by the United States which had succeeded to the rights claimed by the English Crown, and the Tribe's right of occupancy could be abrogated only by the federal government. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-70 (1974); United States v. Santa Fe Pacific R.R., 314 U.S. 339, 345-47 (1941); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 586 (1823).

The purpose of the Nonintercourse Act was to assert the primacy of federal law and to acknowledge and guarantee the Tribe's right of occupancy to their lands. *See Oneida Indian Nation*, 414 U.S. at 667; *Santa Fe Pacific R.R.*, 314 U.S. at 348. The Nonintercourse Act creates a trust or fiduciary relationship between the federal government and the tribe somewhat akin to the relationship of guardian and ward. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975). *Passamaquoddy* establishes that a trust relationship created by the Nonintercourse Act exists even though federal officials charged with supervision of Indian Affairs disclaim any responsibility for the Tribe. *Passamaquoddy* also establishes that the absence of federally recognized tribal government and the exercise of state jurisdiction over a tribe and its members neither dissolves the trust relationship arising out of the Nonintercourse Act nor renders the Act inapplicable to the tribe's claims.

Congress, of course, may terminate the trust relationship, thus abrogating the federally recognized right of the tribe to its occupancy of reservation lands, but its

intention to do so must be plain and unambiguous to be effective. *See* DeCoteau v. United States, 420 U.S. 425, 444 (1975); *Santa Fe Pacific R.R.*, 314 U.S. at 346; *Passamaquoddy*, 528 F.2d at 380. Doubtful expressions of legislative intent must be resolved in favor of the Indians. *DeCoteau*, 420 U.S. at 444.

In support of its contention that the Division of Assets Act of 1959 terminated both the existence of the Tribe and its trust relationship with the federal government, South Carolina particularly relies on the clause in 25 U.S.C. § 935 which provides:

> [T]he Tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.

South Carolina argues that this provision included the withdrawal of the protection conferred on the Tribe by the Nonintercourse Act. The Catawbas insist that this provision of the 1959 Act applies only to individual Indians and not to the Catawba Tribe. The applicability of the Nonintercourse Act to the rights of the Tribe, they assert, was not affected.

The legislative histories of both the Nonintercourse Act and the 1959 Act, and Supreme Court precedent, support the position of the Catawbas. Although the terms "Indians" and "Indian tribes" frequently have been used interchangeably in various contexts, the distinction is critical when the application of the Nonintercourse Act is an issue. Initially the Act applied to both Indians and Indian tribes. Later, however, Congress deleted the reference to Indians. *See* 4 Stat. 730-31 (1834). Henceforth, the Nonintercourse Act afforded protection only to the



lands of Indian tribes. We do not feel free to assume that Congress was unaware of this distinction. We cannot attribute to Congress an intention to bar by the 1959 Act the Catawba's claim to tribal lands. By providing that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them," we conclude that Congress did not intend to render inapplicable the Nonintercourse Act which by its terms applied to Indian tribes. As we have pointed out, the Catawbas had been assured by a representative of the Bureau of Indian Affairs and the congressional sponsor of the 1959 Act that their resolve to preserve their claims against South Carolina would not be affected by the Act. We will not impute to Congress an intent to circumvent these assurances by implicitly enlarging the term "Indians" to embrace the "Catawba Indian Tribe."

Precedent supporting the Catawbas is found in Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). In that case the question arose whether the Menominee Termination Act of 1954 abrogated the Tribe's fishing and hunting rights conferred by a treaty in 1854. The Court held that the Act did not have this effect, saying at 412-413:

> The Termination Act by its terms provided for the "orderly termination of Federal *supervision* over the property and members" of the tribe. 25 U.S.C. § 891. (Emphasis added.) The Federal Government ceded to the State of Wisconsin its power of supervision over the tribe and the reservation lands, as evident from the provision of the Termination Act that the laws of Wisconsin "shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within [its] jurisdiction."
>
> The provision of the Termination Act (25 U.S.C. § 899) that "all statutes of the United States which

affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe" plainly refers to the termination of federal supervision. The use of the word "statutes" is potent evidence that no *treaty* was in mind.

We decline to construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists . . . "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."

There is no explicit or clear implicit indication in the 1959 Act that Congress intended to terminate the relationship arising out of the Nonintercourse Act's application to the lands granted by the 1760 and 1763 Treaties. Furthermore, in at least one similar act, Congress clearly terminated the federal trust relationship with respect to the affected tribe, something it did not do in the 1959 Act. *Compare* 25 U.S.C. § 935 (Catawba Tribe, no explicit termination) *with* 25 U.S.C. § 980 (Ponca Tribe, explicit termination).

## VI

Having concluded that the 1959 Act made the South Carolina statute of limitations applicable to the Tribe's claim, the district court went on to hold that the state statute barred the claim.

Section 936 explicity provides that nothing in the Act shall affect the rights of the Tribe under the laws of South Carolina.[17] For the purpose of the summary judgment entered by the district court, it was assumed that prior to the enactment of the Division of Assets Act in 1959 the South Carolina statute of limitations did not affect the right of the Tribe to claim its tribal reservation. Consequently, it is incongruous to say, despite § 936, that the 1959 Act did affect this right by allowing application of the state statute of limitations to bar the claim. Yet this is precisely what the district court did through its interpretation of the 1959 Act.[18] The 1959 Act neither prohibits nor authorizes the application of state law to bar the Tribe's reservation claim.

We cannot accept the district court's interpretation of the 1959 Act. Consequently, its decision that the state statute of limitations bars the Tribe's claim must be set aside. The Nonintercourse Act and the supremacy clause preempt state law defenses, such as adverse possession or statutes of limitation, which might otherwise preclude the Tribe's suit. *See* Mohegan Tribe v. Connecticut, 638 F.2d 612, 614-15 (2d Cir. 1981); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938).

## VII

We conclude that the Catawba Indian Tribe Division of Assets Act of 1959 did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Nonintercourse Act, or make the state statute of limitations applicable to the Tribe's claim. In short, the 1959 Act is neutral with respect to the Tribe's reservation claim. It neither confirms the claim nor extinguishes it.

The judgment of the district court is reversed, and the case is remanded for entry of an order denying the defendants' motion for summary judgment and for further proceedings consistent with this opinion.

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[17] *See supra* note 6.

[18] The district court held:

> Because [§ 935] of the Catawba Act explicitly made state law applicable to the Catawbas and the termination of the trust relationship accomplished the same result, South Carolina's statute of limitations began to run against any claim the Catawbas or the plaintiff may have had on July 1, 1962, the date the Catawbas' constitution was revoked.

## EXHIBIT C

### The Dissent To The Panel Majority Opinion

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HALL, Circuit Judge, dissenting:

I cannot accept the majority's conclusion that the district court erred in granting defendants' motion for summary judgment and in dismissing plaintiff's action. In my view, the 1959 Catawba Indian Tribe Division of Assets Act, 25 U.S.C. § 931 *et seq.*, unquestionably terminated the Tribe's legal existence, ended any trust relationship between the Catawbas and the federal government, and made South Carolina law fully applicable to whatever claim plaintiff may have had to the Tribe's ancestral land. I agree with the district court that plaintiff's claim, if valid at all, is in any event barred by South Carolina's statute of limitations governing real property. I must, therefore, dissent.

Plaintiff in this case, a non-profit corporation, alleges that it is the successor to the Catawba Indian Tribe and that, as such, it has an ownership interest in approximately 144,000 acres of land in three South Carolina counties. According to the record, however, by 1840, the Catawbas had leased to white settlers all of the 144,000 acres now in dispute.[1] In 1840, the Catawbas entered into an agreement with the State of South Carolina, known as the Treaty of Nation Ford, in which they gave up any remaining interest they had in the 144,000 acres. Now, by seeking to defeat this 1840 transaction, plaintiff requests relief which would destroy the titles of more than 27,000 South Carolina citizens. In light of this history and because of the provisions of the Catawba Act,

[1] The 1763 Treaty of Augusta, entered into between the Tribe and the representatives of the King of England, in which the Catawbas agreed to be settled on the 144,000-acre tract, contained no restrictions on alienating this property.



it is clear to me that plaintiff's claim to the Tribe's ancestral land must fail.

Unlike the majority, I am convinced that the central purpose of the Catawba Act was to terminate federal responsibility to the Tribe and its individual members. Partial termination was specifically rejected by the bill's sponsor and the Catawbas, who voted in favor of complete termination. Furthermore, the plain and far-reaching language of the Act clearly reflects congressional intent to terminate any special federal status the Catawbas may previously have held and to put them on an equal footing with other citizens. To this effect, the Act even includes a provision which revokes the tribe's constitution. Under Section Five of the Catawba Act, 25 U.S.C. § 935:

> The constitution of the tribe adopted pursuant to . . . this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and *the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.* Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States. (Emphasis added).

Section 6 of the Catawba Act, 25 U.S.C. § 936, similarly provides that "[n]othing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members *under the laws of South Carolina.*" (Emphasis added).

In my view, the revocation of the Tribe's constitution unequivocally ended the Catawbas' existence as a political or governmental entity under federal law and prevents

plaintiff from having the necessary standing to bring this action under the Nonintercourse Act. As the majority opinion correctly notes, there are four prerequisites to establishing a prima facie case under the Nonintercourse Act. *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979). One of these requirements is that plaintiff show that it is or represents an Indian tribe. In my view, the revocation of the Tribe's constitution makes it impossible for plaintiff to establish this necessary element of a prima facie case. Furthermore, the revocation of the Catawbas' tribal constitution terminated the trust relationship between the Tribe and the United States, rendering it impossible for plaintiff to meet yet another prerequisite to a prima facie case under the Nonintercourse Act. Because plaintiff can establish neither of these requirements, its claim under the Nonintercourse Act is fatally defective.

Moreover, the explicit statutory language of Sections 5 and 6 of the Catawba Act makes it clear that the legislation was intended to accord the Catawbas the same privileges and responsibilities as other South Carolina citizens. Thus, from the time the tribe's constitution was revoked on July 1, 1962, the Catawbas, and any federal claim they might have then had, were subject to the operation of state law in the same manner as all other citizens of South Carolina and their claims.

One of the laws that became applicable to the Catawbas in 1962 was South Carolina's statute of limitations governing real property claims. S.C. Code § 15-3-340 states in pertinent part that "[n]o action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action." Thus, even if the Catawba Act did not extinguish the Catawbas' claim to the land which their ancestors had long since alienated,



this suit, brought some 18 years after the statute of limitations had begun to run, is unquestionably time-barred.

The application of South Carolina's statute of limitations in this case is entirely consistent with Supreme Court precedent. In *Affilated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), the Supreme Court's most recent decision construing a termination act, terminated Indians were required to challenge allegedly fraudulent transfers of property under the same laws as non-Indians. In an earlier decision, *Schrimpscher v. Stockton*, 183 U.S. 290 (1901), Indian heirs sued to recover land conveyed by a Wyandotte Indian at a time when alienation was prohibited by federal treaty. In light of a subsequent treaty, which had terminated such restrictions, the Supreme Court held that the state statute of limitations had run, precluding recovery:

> Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered [sic] title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, *they were bound to assert their claims within the period limited by law.* This they did not do under any view of the statute, (whether the limitation be three or fifteen years,) since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years. *Id.* at 296. (Emphasis added).

*See also, Dillon v. Antler Land Co.*, 341 F.Supp. 734 (D. Mont. 1972), *aff'd* 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); *Dennison v. Topeka Chambers Industrial Development Corp.*, 527 F.Supp. 611 (D. Kan. 1981) (both holding that state statutes of

limitations began to run once restrictions are removed and state law is made applicable).[2]

As the Tenth Circuit noted in *Reyos v. United States*, 431 F.2d 1337, 1343 (10th Cir. 1970), *aff'd in part and rev'd in part, Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), "[i]t is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination." I submit that the majority in this case has impermissibly substituted its own judgment for that of Congress. By doing so, it has succeeded in nullifying the clear mandate of the Catawba Act and has placed in jeopardy the long-established rights of over 27,000 South Carolina citizens. Because I believe the district court was correct in dismissing plaintiff's action, I would affirm the judgment below.

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[2] The majority's reliance on the Supreme Court's decision in Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), is misplaced. In *Menominee*, the tribal constitution was not revoked, as in the present case. Furthermore, the hunting and fishing rights, which were the subject of the Menominees' claim, had never been alienated. In this case, the Catawbas have not occupied the property in question for more than 180 years.



## EXHIBIT D

### The Concurring Opinion To The En Banc Decision

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MURNAGHAN, Circuit Judge, concurring:

For the reasons so cogently expressed by Judge Butzner in his opinion for the panel majority, I agree that "the Catawba Indian Tribe Division of Assets Act of 1959 did not ratify the 1840 Treaty, extinguish the Tribe's existence, terminate the trust relationship of the Tribe with the federal government arising out of the Nonintercourse Act, or make the state statute of limitations applicable to the Tribe's claim." *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 718 F.2d 1291, 1300 (4th Cir. 1983).[1] While the dissent has delivered a respectable argument to the contrary, we face at most a case in which the congressional statment is open to dual interpretations. We may, however, permit only a plain and unambiguous expression of congressional intent to abrogate a federally recognized right and terminate a trust relationship. Furthermore, construction of statutes affecting Indian tribes should proceed on the basis of tender concern for the rights of Indians. The uncertainty in statutory interpretation in the instant case is properly resolved in favor of the Catawba Tribe.

I therefore unreservedly join in the opinion of Judge Butzner, reversing the award of summary judgment in favor of South Carolina. As for the other defendants, landowners of parcels compositely comprising the 144,000 acres, no arguments separate and distinct from those ad-

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[1] Judge Butzner's panel majority opinion is adopted by reference in the *per curiam* opinion following *en banc* rehearing. Judge Butzner was joined by Chief Judge Winter, Judge Sprouse, and now by me. The opposing opinion of Judge Hall was joined by Judge Widener and Judge Phillips. It, too, is incorporated by reference in the *per curiam* opinion.

vanced on behalf of the State of South Carolina have been made, and consequently, on the present state of the record I also agree that summary judgments in their favor should be reversed.

My concurrence with respect to the private defendants, however, is a troubled one. Since the Tribe's claim at present includes the right to actual possession, a complete victory for the Catawba Tribe would leave up in the air or by the side of the road the approximately 27,000 people claiming title through deeds or other sources to the 144,000 acres. It appears to be a tacit assumption that ejection would never be allowed actually to occur, even were we in the end to validate continued vitality of the Indian title to the 144,000 acres. Rather, through accommodation between the Indians and either or both of the United States and the State of South Carolina, the Catawba Tribe would relinquish all possessory claims in return for money or other benefits.

For myself, I take little solace in the consideration that a proper, fair and equitable result *may* possibly come about by reason of enlightened, but by no means mandatory, legislative or executive action. Such a posture would still leave too many innocent good faith landowners at an awesome risk that political realities related to efforts by both sovereigns to right a long standing wrong, might lead to the Queen of Spades ultimately winding up in the hands of the individual owners.

While I therefore harbor grave doubts, that, as a matter of grace, a government will rescue the current occupants of the land, I take greater comfort in the realization that there may be available on remand an argument that would at once retain the vitality of the claims of the Catawba Tribe and also afford protection to the innocent, private landowners.

> [A]s the Supreme Court held in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294 (1926), if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an "impossible" remedy, *id.* at 357, 47 S.Ct. at 143, the court has authority to award monetary relief for the wrongful deprivation. *Id.* at 359, 47 S.Ct. at 144.



*Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1083 (2nd Cir. 1982). In reaching its result, the *Yankton* court expressed its concerns for the plight of the innocent landowners:

> It is impossible, however, to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . .

*Yankton Sioux Tribe v. United States, supra*, at 357. The court concluded that, since the Indians were entitled to a judgment in their favor, but a restoration of the lands to the Indians was an impossible remedy, the Indians were "entitled to just compensation as for a taking under the power of eminent domain." *Id.* at 359.[2]

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[2] It is not particularly earthshaking for a court to tailor the remedy to the problem at hand. Monetary relief representing fair value is "just compensation" and constitutionally is the equivalent of tangible or real property. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. 131.68 Acres of Land*, 695 F.2d 872 (5th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 77 (1983) ("[T]he government must, and need do no more than, put the owner in '. . . as good a position pecuniarily as if his property had not been taken.'" *Id.* at 875, *quoting Olson v. United States, supra*, at 255). The public purpose to justify a taking is not open to serious question. At a bare minimum, present occupants should not be required, because customarily in unitary instances of ejectment the remedy is return of the property itself and not a monetary "substitute," to surrender possession, if just compensation is indeed awarded to the Catawba Tribe.

Under *Yankton* and *Oneida*, therefore, one or both of the sovereigns (the United States or South Carolina) may indeed owe to the Tribe just compensation. On that basis, the titles of the 27,000 landowners would be held to be paramount and they, without surrender of the land or payment in cash, would be entitled to judgment. South Carolina's liability might arise from the fact that, assuming that the 1840 Treaty is invalid under the Non-intercourse Act, the state entered into an invalid treaty with the Catawba Tribe and induced innocent landowners to settle on the land. That may be held to translate into an obligation to protect the present occupants or other claimants by paying just compensation to the Catawbas for the land.

As for the United States,[3] it remains to be explored whether liability to pay just compensation to the Indians

[3] Nothing should preclude amendment by the Catawba Tribe of its complaint to name the United States as a defendant, thereby presenting the issue for resolution. Similarly, South Carolina might endeavor to raise the question through impleading the federal government.

It would remain to be seen whether either the Catawba Tribe or South Carolina could overcome a likely claim of sovereign immunity raised by the United States. *See, e.g., Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141-143 (1972). *Cf. Antonie v. United States*, 637 F.2d 1177, 1181-82 (11th Cir. 1981); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 146-147 (8th Cir. 1970). *See also United States v. Oneida Nation of New York*, 477 F.2d 939 (Ct. Cl. 1973). It might become necessary to explore the possibility that consent in this instance can be inferred from the Nonintercourse Act, the 1959 Act or even some future legislation Congress may see fit to enact.

An analogous obstacle to recovery from South Carolina may arise in the Eleventh Amendment context. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974). *But cf., Parden v. Terminal Railway*, 377 U.S. 184 (1964); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). *See generally*, L. Tribe, *American Constitutional Law*, 129-138 (1978).

Alternatively, the time may be at hand to decide whether, in the dying writhings of an outmoded concept, time has passed sovereign



arises, either from the Government's failure to protect their claim to possession despite the special relationship between the United States and the Indians, or from the government's failure to extinguish the Catawba's possessory claims in light of the extensive reliance by the innocent parties on apparently good and clear title.[4]

The resolution of the competing claims through the just compensation concept has the great and equitable advantage of protecting the innocent landowners from sustaining monetary injury. Certainly, the two sovereigns, the United States and the State of South Carolina,

immunity by if not elsewhere in the absence of legislative consent to be sued, at least in the area of executive and legislative actions relating to relationships at the highest governmental levels such as those between the United States and an Indian tribe.

Even if sovereign immunity concepts still would preclude in this case recovery against the United States and South Carolina, they concern only a jurisdictional barrier, and do not preclude judicial allocation of rights and responsibilities. If the United States and South Carolina elect to plead sovereign immunity, and therefore to waive the right to appear and assert their positions when a court is determining who owes what to whom, a right of the Catawba Tribe against the sovereigns may no less be asserted and established even if judicially it may not be enforced. The right, outstanding if not realizable by judicial process, may nevertheless be pursued in the halls of the legislatures. It should not lightly be inferred that a government, the best we know and have, will not respond to a valid claim or claims simply because it cannot be compelled to pay.

The question here remains as to where rights and responsibilities to the land or to compensation for it lie. Legally, the question of who is entitled is not the same as who may enforce in court the entitlement. It remains for a later stage in these proceedings to address potentially far-reaching and tantalizingly fascinating questions.

[4] It may also become necessary to consider whether cases such as *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-5 (1955) are distinguishable on the basis that, in those cases, explicit and affirmative action by the Congress, rather than neglect or a failure to act, led to the abrogation of the Indians' possessory claims.

have done nothing to warn them off the land. To the contrary, the sovereigns have actively encouraged their settlement or the settlement of their predecessors, and, no doubt, have actively benefited through real property and income taxes assessed against the land in their hands or against profits generated by its use.

Resolution of the issues raised above is, of course, premature. After remand, it remains possible that one, or both, sovereigns can be stimulated into doing what together they should have done long since. Additionally, the parties may be able to resolve their differences by means wholly apart from those suggested here. The route described is merely one attempt to avoid remedying one inequity by perpetrating another, perhaps greater, one. It would indeed be tragic and unfair for the long-overdue resolution of the Catawba Tribe's claims to occur exclusively and disproportionately at the expense of the more than 27,000 innocent South Carolina citizens with claims to the contested land, more recent in the sense of strict accuracy than those of the Tribe, but long standing in fact, reaching back over 140 years. By our society's general attitude, a title of that uninterrupted duration should be good against the world.



**EXHIBIT E**

**The District Court Opinion**

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IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

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Civil Action No. 80-2050

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the CATAWBA NATION OF SOUTH CAROLINA,
*Plaintiff*

v.

STATE OF SOUTH CAROLINA, *et al.*,
*Defendants*

[Filed June 14, 1982]

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MEMORANDUM AND ORDER GRANTING
SUMMARY JUDGMENT

*INTRODUCTORY REVIEW*

The complaint in this civil action was filed October 28, 1980. This suit was brought by the Catawba Indian Tribe of South Carolina for possession of approximately one hundred forty thousand (140,000) acres of land in York, Lancaster and Chester Counties, South Carolina, which plaintiff maintains were illegally taken from it by the Treaty of Nation Ford with the State of South Carolina in 1840. It also seeks historic trespass damages for the period of its dispossession.

Plaintiff claims that the subject lands were reserved as an Indian reservation in treaties with the King of England in 1760 and 1763. Upon the adoption of the Constitution and the Indian Nonintercourse Act of 1790, Indian affairs came under the exclusive province of the Federal Government. Thus, plaintiff asserts that because the United States did not participate in or subsequently ratify the 1840 Treaty with South Carolina, the transaction is void, conveyed no legal title and the subject lands remain an Indian reservation to this day. Plaintiff bases its claim upon the treaties with the Crown, the United States Constitution, and the Nonintercourse Act, which is presently codified at 25 U.S.C. § 177.

It is noticed in the complaint that the Catawba Tribe of South Carolina is duly organized under the laws of the State of South Carolina as a nonprofit corporation. Plaintiff Catawba Indian Tribe, Inc., is the successor to the Catawba Indian Tribe which was a signatory to the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763.

In this lawsuit, plaintiff has joined approximately ninety defendants, which include the State of South Carolina, other public entities, corporations and individuals. Those defendants are sued both individually and as representatives of all other persons who assert an interest in any portion of the subject lands. Plaintiff filed a motion for class certification asserting that the class will total at least 27,000 persons.

Upon the filing of this case all the District Judges for the District of South Carolina recused themselves. Thereafter this civil action was assigned to the undersigned by special designation. In the meantime, Chief Judge Charles E. Simons, Jr., entered an Order upon the motion of counsel for plaintiff extending the time to answer or otherwise plead to the complaint for 20 days following an Order disposing of plaintiff's motion to certify the



defendant class. In the meantime many appearances by counsel were entered on behalf of the various defendants. Thereafter a status conference was held before the undersigned on February 18, 1981. Pursuant to the understanding reached with counsel, a schedule with respect to filing 12(b) motions and replies thereto was indicated in my Order of April 15, 1981, which in turn stayed consideration of motions for class certification and the filing of any motions by plaintiff pursuant to Rule 56. Thereafter on June 19, 1981, defendants filed a motion to dismiss accompanied by a brief in support of its motion as well as an appendix to the memorandum in support of the motion to dismiss. Plaintiff filed a response to defendants' motion to dismiss on August 20, 1981, together with appendix exhibits in response to defendants' motion to dismiss.

A full hearing on defendants' dismissal motion was held at Rock Hill on October 28, 1981. It is to be observed in this case that able and experienced counsel represent these parties. The oral argument and written documents and especially briefs exhibit the high professional learning and aptitude on the part of the lawyers in this case. They have been amiable and considerate among themselves and with the Court.

It is to be observed that at the October hearing a wide range of oral argument and discussion took place in open court. It developed that although the dismissal motion was filed under Rule 12(b)(6), that is, (on the ground that the complaint failed to state a claim upon which relief can be granted), matters outside the pleadings were discussed and considered, that is, the appendices accompanying the briefs of each counsel which were not excluded by the Court. Thus the motion was to be treated as a motion for summary judgment and disposed of as provided in Rule 56.

Counsel for South Carolina and for the other defendants from the inception of this lawsuit have contended

that the statute enacted by Congress in 1959 referred to as both the Catawba Termination Act and the Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. 931 et seq., must be given effect by this Court, and when the statute is applied this case must be dismissed.

Apparently because of the wide ranging discussion and oral argument at the October 28th hearing, defendants' counsel on November 25, 1981, filed a motion for entry of a supplemental order together with a brief in support thereof, as well as the proposed supplemental order. On December 7, 1981, plaintiff's counsel filed a motion in response to defendants' motion for the supplemental order in which it was indicated that plaintiff had no objection to the supplemental order as suggested by defendants. Whereupon the following order was entered by this Court on January 15, 1981:

*"SUPPLEMENTAL ORDER*

"*1.* On or before February 26, 1982, the plaintiff and the moving defendants each shall submit proposed orders for the resolution of the motion for summary judgment. The proposed orders shall address only the issues previously briefed and argued by the parties before this Court concerning the consequences of the 1959 legislation referred to by the defendants as the Catawba Termination Act.

"*2.* The Court understands that accompanying defendants' brief in support of its Motion To Dismiss it filed appendices with Exhibits 1 through 39 inclusive, and opposing defendants' motion plaintiff filed Exhibits 1 through 61 inclusive with its brief. The Court further understands that counsel stipulated at the hearing October 28, 1981, at Rock Hill, that these two appendices are now in evidence and are a historical record and are the basis for the Court's ruling that the motion in this case is to be decided under Rule 56 rather than under Rule 12(b)(6).



"*3.* Within 20 days after the proposed orders are exchanged between counsel, if desired, supplemental briefs may be filed. Thereafter, oral argument may be directed."

Thereafter on February 26, 1982, defendants' counsel filed a proposed order styled: *Proposed Order Granting Summary Judgment.* On the same date, counsel for plaintiff filed a proposed order in opposition to defendants proposed order. Plaintiff's proposal is extensive. It has some 52 factual statements and some 60 conclusions of law. It seeks a denial of defendants' motion for summary judgment.

This Court is of the firm view that a decision must be made as to whether the Catawba Termination Act is to be given the effect as contended by defendants or given the limited effect as contended by plaintiff, that is, that only the Memorandum of Understanding entered into in 1943 between the Federal Government, the State of South Carolina, and the Catawba Indian Tribe was terminated by the statute.

Upon due consideration of the two proposed orders presented together with the historical record and the authoritative decisions cited by counsel, as well as the respective arguments, this Court has concluded that there is no genuine issue as to any material fact and that defendants' motion for summary judgment must be granted and this case dismissed.

Congress having acted, it is believed that this Court should give full effect to the statute since from the inception of this Government Congress has regulated the affairs of Indians in all their aspects.

Defendants' proposed order granting summary judgment submitted by counsel for defendants is herewith adopted and made an integral part of this decision.

Plaintiff's proposed order for a judgment in opposition thereto is rejected.

Defendants' order follows:

## I. *INTRODUCTION TO DEFENDANTS' ORDER*

### A. *The Claim*

This action seeks to void the titles presently held by more than 27,000 persons and public or private entities to land in a 225 square mile area surrounding and including Rock Hill, South Carolina. The plaintiff, Catawba Indian Tribe of South Carolina, Inc., is a corporation operated by persons claiming to be the descendants of Catawba Indians. The plaintiff alleges that the Catawba Indians owned and occupied the land in issue "from time immemorial", and that their ownership was confirmed by agreements and treaties with British and colonial officials in 1760 and 1763. In 1840, the Catawba Indians entered into the Treaty of Nation Ford with the State of South Carolina and thereby transferred any interest they might have had in that land to the State of South Carolina. That treaty and all titles deriving from it are alleged to be void because the transfers effected by that Treaty allegedly violated those provisions of the various Indian Trade and Intercourse Acts regulating the alienation of Indian land, known as the Non-intercourse Act and presently codified as 25 U.S.C. § 177.

### B. *The Motion*

The defendants' motion asserts that a 1959 act of Congress (codified at 25 U.S.C. §§ 931-938 and referred to here as the "Catawba Act") bars the prosecution of this action as a matter of law. The defendants' motion has been treated as a motion for summary judgment because, pursuant to the stipulation of the parties, the exhibits to their memoranda have been considered as historical background concerning the Catawba Act.



The only fact necessary to resolve this motion is the undisputed fact that, in 1959, Congress passed the Catawba Act. Because the defendants' motion is addressed solely to the effect of that act upon the legal status of the Catawbas and their claims, the plaintiff's allegations concerning its status prior to 1959 have been assumed, but not found, to be true. Similarly, the plaintiff's allegations concerning events occurring before the 1950's have been assumed, but not found, to be true.

## II. *UNDISPUTED FACTS AND ALLEGATIONS ASSUMED TO BE TRUE*

### A. *The Parties*

1. The plaintiff is the Catawba Indian Tribe of South Carolina, Inc. ("plaintiff"), a non-profit organization incorporated under the law of South Carolina. [Complaint ¶ 5] The plaintiff's assertions that the persons whom it represents, or their ancestors, were at all relevant times prior to 1959 an Indian tribe, and that plaintiff corporation has succeeded to any rights the alleged tribe may have had, are *assumed* to be true for the purpose of this motion only. The Court judicially notices, however, that the United States appears never to have formally recognized the Catawbas, and notes that the factual question of whether the Catawbas were a tribe is, in any context other than the present motion, disputed.

2. The defendants include the State of South Carolina, other public entities, corporations and individuals. Those defendants are alleged to be representative of a class of at least 27,000 people. [Affidavit of Robert M. Jones, filed October 29, 1980 in support of Plaintiff's Motion for Class Certification]

### B. *The Land In Issue*

3. The land sought by the plaintiff but currently held by the defendants and the putative class consists of ap-

proximately 144,000 acres or 225 square miles which includes the City of Rock Hill, the Town of Fort Mill and several other smaller communities. Presently located on the land in issue are homes, places of business, schools, churches and government buildings. The land lies in York, Lancaster, and, perhaps, Chester Counties. [Complaint ¶ 1, 4]

C. *Ancient Events Involving The Land In Issue*

4. Neither party has been able to furnish the Court with any document containing the terms of the 1760 Treaty of Pine Tree Hill. However, for the purpose of deciding this motion only, it has been assumed that the Treaty existed and granted the Catawbas some interest in the land in issue.

5. The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part, only that:

> And we the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

[Plaintiff's Exhibit 6]

6. Nothing in the 1763 Treaty of Fort Augusta prohibited the Catawbas from alienating the 15 mile square area of land referred to in the Treaty, or prohibited any person from acquiring that land. [*Id.*]



7. The Treaty of Nation Ford was executed in 1840. At the time that Treaty was executed the Catawbas had apparently leased to white settlers all of the land referred to in the 1763 Treaty of Fort Augusta. By the terms of the Treaty of Nation Ford the Catawbas agreed to grant their remaining interest in the land in issue to the State of South Carolina in return for the purchase of a tract of land having a value of $5,000, the payment of $2,500 upon their removal from their former lands, and $1,500 each year for nine years. [Plaintiff's Exhibit 12, 15]

8. On December 24, 1842, approximately 630 acres of land were purchased for the Catawbas and held in trust by the State of South Carolina. [Complaint ¶ 5, 19; The 630 acres are sometimes referred to as 638 or 652 acres. *See*, Plaintiff's Exhibit 15]

D. *The 1943 Memorandum of Understanding*

9. In 1943 the State of South Carolina, the Catawbas and the Office of Indian Affairs of the United States Department of Interior entered into a Memorandum of Understanding. Pursuant to that Memorandum of Understanding, South Carolina agreed to authorize the expenditure of up to $75,000 to purchase lands for the Catawbas, and, upon request, to convey to the United States in trust the land then held by South Carolina in trust for the Catawbas as a result of the 1840 Treaty. Pursuant to the Memorandum of Understanding, South Carolina also agreed to appropriate at least $9,500 annually in 1944, 1945 and 1946 to be expended by the Office of Indian Affairs, and to extend the rights and privileges of all citizens, including admission to schools, to the Catawbas. The Office of Indian Affairs further agreed to contribute annually such sums as were available to the welfare of the Catawbas, and to assist the Catawbas in matters involving education, medical treatment, and economic development. [Plaintiff's Exhibit 52]

E. *Events In The Twentieth Century Leading To The Enactment Of The Catawba Act.*

10. On August 1, 1953 House Concurrent Resolution 108 was passed. That Resolution declared that the policy of Congress was to make Indians within the United States subject to the same laws as other persons and to terminate any special status they might have had under federal law. [H.R. Con. Res. 108, H.R. REP. No. 2680, 83d Cong., 2d Sess. (1954), Defendants' Exhibit 3]

11. In September 1954, a special House Study Subcommittee on Indian Affairs reported that, on the basis of information collected by the Bureau of Indian Affairs, the Catawbas were among the Indian groups able to manage their own affairs and ready for termination. [H.R. Rep. No. 2680, 83d Cong., 2d Sess. (1954) at 2-3, Defendants' Exhibit 6]

12. In 1959 South Carolina Congressman Robert Hemphill introduced H.R. 6128, [105 Cong. Rec. 5466 (1959), Defendants' Exhibit 21] which was to become the Catawba Act. Congressman Hemphill told his congressional colleagues during debates on the legislation:

> It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.

[105 Cong. Rec. 5462 (1959), Defendants' Exhibit 22]

In hearings on the legislation he similarly stated:

> A majority of the Indians want this legislation. They need it to put them on the same status as other citizens with the same responsibilities.

[Transcript of the hearings on H.R. 6128 at 10]

13. Before the bill was introduced, the following steps were taken to insure that the Catawbas desired to be terminated:



a. Congressman Hemphill requested that a Bureau of Indian Affairs Program Officer be appointed to reside at Rock Hill for a sixty day period to develop a satisfatcory plan for the Catawbas. [Defendants' Exhibit 14];

b. The Catawbas adopted a resolution on January 3, 1959 requesting Congressman Hemphill to secure passage of legislation removing federal restrictions on the alienation of their land, [Resolution of Catawba Tribe of Indians, January 3, 1959, Defendants' Exhibit 17];

c. Congressman Hemphill met with the Catawbas on March 28, 1959 and explained the purpose of the legislation to be to dispose of the assets of the tribe and terminate federal responsibility to the tribe and its individual members. At the conclusion of the meeting, and following the explanation, the Catawbas again voted in favor of the bill. [Defendants' Exhibit 19]

14. On September 21, 1959 President Eisenhower signed the bill which became the Catawba Act. [Defendants' Exhibit 27]

15. Pursuant to the terms of 25 U.S.C. § 931, a plebiscite was held among the adult members of the Catawbas. The explanation of section five of the act (25 U.S.C. § 935) furnished to the Catawbas explained that:

> Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes," so the individual members will no longer be subject to laws which apply only to Indians. Nothing in the act prohibits those interested in organizing under

State law to carry on any of the nongovernmental activities of the group.

[Defendants' Exhibit 29]

16. On July 1, 1960 the Secretary of the Interior published a notice in the Federal Register that a majority of the adult Catawbas had indicated their agreement to the provisions of the bill and that the provisions of the Catawba Act were effective as of that date. [25 Fed. Reg. 6305, Defendants' Exhibit 32]

17. On July 1, 1962 the Catawbas' constitution was revoked and the termination process was completed. [Defendants' Exhibits 35, 36]

18. The Catawbas have never been relieved of the consequences of the Catawba Act. The Bureau of Indian Affairs continues to list them among its current list of terminated Indian tribes. [Defendants' Exhibit 39]

19. On October 28, 1980, more than eighteen years and three months after the revocation of the Catawbas' consitution and more than twenty years and three months after the effective date of the Catawba Act, the complaint in this action was filed.

## III. *CONCLUSIONS OF LAW*

After considering the undisputed facts (and assumed matters) referred to above and considering the relevant principles of law, this Court concludes that no genuine issue of material fact exists and that defendants are entitled as a matter of law to the entry of a judgment dismissing this action. As a result of the enactment of the Catawba Act four separate grounds independently require entry of judgment in favor of the defendants. The first ground, the failure of the plaintiff to commence this action within the time provided by the applicable statute of limitations, bars any claim the plaintiff may assert without regard to the basis of the claim. The remaining three grounds require dismissal because the enactment of the Catawba Act precludes the plaintiff from proving, as a matter of law, three elements of the prima facie case required to state a claim under the Nonintercourse Act.[1]



### A. *The Provisions Of the Catawba Act Make The South Carolina Statute Of Limitations Apply To Any Claim The Catawbas May Have To The Land In Issue, And Any Such Claim Is Barred.*

1. Section five of the Catawba Act, 25 U.S.C. § 935, provides that after the Catawbas' constitution was revoked (which occurred on July 1, 1962):

> [T]he laws of the several States shall apply to them [the Catawbas] in the same manner they apply to other persons or citizens within their jurisdiction.

That explicit statutory language directed that state law apply to the Catawbas from the moment their constitution was revoked.

2. The legislative history of the Catawba Act, consisting of the statements of the bill's sponsor and the Department of the Interior, indicates that the Act was intended to provide the Catawbas the same privileges and same responsibilities as other South Carolina citizens. After its passage, the Catawbas were to have the same status as non-Indians. Thus, they and their claims were to be subject to state law in the same manner as other citizens and their claims.

3. Further, even if the provisions of the Catawba Act, as amplified by its legislative history, were less clear,

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[1] The defendants have suggested that they intend to dispute not only whether the Nonintercourse Act applies in this instance, but also whether the Nonintercourse Act may properly be construed to afford a private right of action. For the purposes of this motion the Court has assumed that such a private right of action exists.

termination of the Catawbas' special federal status accomplished the same result. The Catawba Act is unquestionably a "termination act" which terminated any special federal status the Catawbas may previously have held. The Catawba Act was passed during the period when House Concurrent Resolution 108 firmly established the federal policy to make Indians subject to the same laws as other persons and to terminate any special status the Indians may have had under federal law. The Catawba Act is in a form similar to the language contained in other termination acts, *see, e.g.*, 25 U.S.C. §§ 721-728 (Alabama-Coushatta); 25 U.S.C. §§ 564-564x (Klamath); 25 U.S.C. §§ 971-980 (Ponca). The Catawba Act was viewed, and referred to, as an act which would terminate any special Indian relationship to the federal government both before it was enacted, H.R. REP. No. 910, 86th Cong., 1st Sess. (1959), and S. REP. No. 863, 86th Cong., 1st Sess. (1959), Defendants' Exhibits 25, 26], and after it was enacted. [Excerpts from Hearings on S. 3174 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 87th Cong., 2d. Sess. (1962); Bureau of Indian Affairs Branch of Tribal Relations list: Indian Tribes Terminated from Federal Supervision, April 1, 1981, Defendants' Exhibit 10, 39]; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 133 n.1 (1972). The termination of the special federal status of the Catawbas' made state law apply to them, and to any claim they may have had. *See, e.g., Taylor v. Hearne*, 637 F.2d 689 (9th Cir., *cert. denied*, —— U.S. ——, 102 S.Ct. 291 (1981); *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976).

4. Because section five of the Catawba Act explicitly made state law applicable to the Catawbas and the termination of the trust relationship accomplished the same result, South Carolina's statute of limitations began to run against any claim the Catawbas or the plaintiff may have had on July 1, 1962, the date the Catawbas' constitution was revoked. *See, e.g., Schrimpscher v. Stockton*, 183 U.S. 290 (1902); *Dillon v. Antler Land Co.*, 341 F. Supp. 734 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974) *cert. denied*, 421 U.S. 992 (1975); *Dennison v. Topeka Chambers Development Corp.*, 527 F. Supp. 611 (D. Kan. 1981).



5. The relevant South Carolina statute of limitations is § 15-3-340. The statute requires that an action to recover title or possession be brought within ten years. An action to recover title or possession brought more than 18 years after that statute began to run is, accordingly, barred. Although South Carolina appears to prevent a party from obtaining title by adverse possession from "tacking" his period of possession to a predecessor's period of possession (unless the land passed by inheritance) that rule is not relevant to the defendants' assertion that the plaintiff's claims are barred by the statute of limitations. *Haithcock v. Haithcock*, 123 S.C. 61; 115 S.E. 727 (1920).

6. Although the plaintiff asserts claims other than those based on the Nonintercourse Act, the United States imposed no general restraint on the alienation of lands owned by Indians other than the various versions of the Indian Trade and Intercourse Acts, the first of which was enacted on July 22, 1790, and imposed no specific restraint on the alienation of these lands. Even if such other claims existed, section five of the Catawba Act has made the South Carolina statute of limitations apply, and bar, those claims.

7. The plaintiff's arguments against the application of the South Carolina statute of limitations are unavailing:

a. It is inconsistent with the language and legislative history of the Catawba Act, and with official federal policy during the termination era, to read

the Act only to revoke the 1943 Memorandum of Understanding. The Catawba Act does not mention the Memorandum of Understanding. Moreover, an act of Congress was not required for the United States either to enter into or to terminate that Memorandum of Understanding.

b. Construing the Catawba Act as making state statutes of limitation apply and begin to run would not "extinguish" any rights. Under this construction, the Act merely changed the procedures by which the Catawbas' could enforce any rights they may have had and ended any trust obligation the federal government may once have had. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972).

c. Finally, *Menominee Tribe v. United States*, 391 U.S. 404 (1968), does not require a different result. First, the *Menominee* Court read other legislation, Public Law 280, to be in *pari materia* with the Menominee termination act because both acts had been passed by the same Congress. Public Law 280 does not apply to the Catawbas, 67 Stat. 588 as amended, 18 U.S.C. § 1162, and, therefore, *Menominee* has no application here. *Sac and Fox Tribe of Mississippi in Iowa v. Licklider*, 576 F.2d 145 (8th Cir.), *cert. denied*, 439 U.S. 955 (1978). Second, no provision of any treaty is claimed to protect any interest the Catawbas may have had, to have prevented the Catawbas from voluntarily alienating any interest they may have had, or to entitle the plaintiff to the recovery of the land in issue. Instead, plaintiff claims that it voluntarily conveyed, in violation of a statute an interest in land which it acquired by a treaty. *Menominee* recognized that statutory rights and privileges were subject to all the effects of termination.



B. *As A Result Of The Catawba Act, The Plaintiff Cannot Prove That It Is An Indian "Tribe".*

8. In order to prevail on its Nonintercourse Act claims, the plaintiff must demonstrate that it presently constitutes an Indian tribe within the meaning of the Nonintercourse Act, *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 and 587 n.8 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), was a tribe when the Nonintercourse Act was violated, *Epps v. Andrus*, 611 F.2d 915, 918 (1st Cir. 1979), and continuously was a tribe in the intervening period. *See, Mashpee Tribe v. New Seabury Corp., supra*; *cf.*, 25 C.F.R. § 54.1 *et seq.*

9. The Catawba Act precludes the plaintiff, as a matter of law, from demonstrating present or continuous tribal existence. To be a tribe a group must have a legal and political existence setting it apart from the general mass. *United States v. Joseph*, 94 U.S. 614, 617 (1877); *United States v. Antelope*, 430 U.S. 641, 646 (1977). Congress may, however, terminate the political existence which is crucial to tribal existence. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

10. Section five of the Catawba Act revoked the tribal constitution and dissolved the former tribal government of the Catawbas. After the revocation of the tribal constitution the Catawbas were not a governmental entity. Instead, they were permitted to organize on a voluntary basis under state law to carry on nongovernmental activities of the group. Congress' explicit termination of the special federal relationship between the Catawbas and the United States bars the plaintiff, as a matter of law, from proving present or continuous tribal existence.

C. *Congress Ratified The Transfer Of The Land Effected By The 1840 Treaty.*

11. Congress may ratify, and thereby validate, a disputed transfer of Indian land in any manner which recognizes the occurrence or effect of the transfer, including a

statute enacted long after the transfer. *See, e.g., Seneca Nation of Indians v. United States*, 173 Ct. Cl. 912 (1965). A subsequent congressional enactment which recognizes that land formerly owned by Indians is no longer owned by them has been construed to validate the original transfer, *Seneca Nation, supra*, as has an enactment which authorized the United States to receive and administer the funds received from the disputed transfer. *Seneca Nation v. Christy*, 126 N.Y. 122 (1891), *writ of error dismissed on other grounds*, 162 U.S. 283 (1896).

12. Congress was unquestionably aware of the 1840 Treaty of Nation Ford and in fact reference is made to it in the House Committee Report. [H.R. REP. No. 910, 86th Cong., 1st Sess. (1959), Defendants' Exhibit 25] Further, section two of the Catawba Act, 25 U.S.C. § 932, explicitly refers to the assets held by the State of South Carolina in trust. Those "assets" included the 630 acres purchased for the Catawbas as a result of the 1840 Treaty. Congress' explicit recognition of those assets and treatment of them in the Catawba Act constitutes explicit recognition and an implicit ratification of the 1840 Treaty.

D. *The Catawba Act Ended Any Trust Relationship Between the United States And The Catawbas.*

13. Finally, to successfully maintain a Nonintercourse Act claim the plaintiff must demonstrate that the alleged trust relationship between it and the United States has never been terminated. *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976); *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). In this case the Congress has, by enacting the Catawba Act, terminated any trust relationship which ever existed between the Catawbas and the United States.

A judgment order follows:



IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

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Civil Action No. 80-2050

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA NATION OF SOUTH CAROLINA,
*Plaintiff*

v.

STATE OF SOUTH CAROLINA, *et al.*,
*Defendants*

[Filed June 14, 1982]

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JUDGMENT ORDER

AND NOW, *June 10, 1982*, in accordance with the Findings and Conclusions mentioned in the foregoing Memorandum, there being no genuine issue as to any material fact, the motion of defendants for the entry of summary judgment in their favor is granted, and judgment is entered for the defendants and against plaintiff, and this civil action is dismissed of record.

DONE AND ORDERED at Pittsburgh, Pa., for filing at Columbia, South Carolina, effective when filed by the Clerk.

/s/ Joseph P. Willson
JOSEPH P. WILLSON
Senior District Judge

## EXHIBIT F

**The Statute To Be Construed**
**Text of 25 U.S.C. §§ 931-938 (1976)**

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## CATAWBA TRIBE OF SOUTH CAROLINA: DIVISION OF ASSETS

### § 931. Publication of notice of agreement to division of assets; closure of roll; preparation of roll; protests against inclusion or omission from roll; finality of determination; final publication

When a majority of the adult members of the Catawba Indian Tribe of South Carolina, according to the most reliable information regarding membership that is available to the Secretary of the Interior, have indicated their agreement to a division of the tribal assets in accordance with the provisions of sections 931-938 of this title, the Secretary shall publish in the Federal Register a notice of that fact. The membership roll of the Catawba Indian Tribe of South Carolina shall thereupon be closed as of midnight of the date of such notice, and no child born thereafter shall be eligible for enrollment. The Secretary of the Interior with advice and assistance of the tribe shall prepare a final roll of the members of the tribe who are living at such time, and when so doing shall provide a reasonable opportunity for any person to protest against the inclusion or omission of any name on or from the roll. The Secretary's decisions on all protests shall be final and conclusive. After all protests are disposed of, the final roll shall be published in the Federal Register. Pub.L. 86-322, § 1, Sept. 21, 1959, 73 Stat. 592.

### § 932. Personal property rights; restrictions

Each member whose name appears on the final roll of the tribe as published in the Federal Register shall be entitled to receive an approximately equal share of the



tribe's assets that are held in trust by the United States in accordance with the provisions of sections 931-938 of this title. This right shall constitute personal property which may be inherited or bequeathed, but it shall not otherwise be subject to alienation or encumbrance. Pub.L. 86-322, § 2, Sept. 21, 1959, 73 Stat. 592.

### § 933. Distribution of assets

The tribe's assets shall be distributed in accordance with the following provisions:

**Assets held in trust by State**

(a) If the State of South Carolina by legislation authorizes assets that are held by the State in trust for the tribe to be included in the distribution plan prepared by the Secretary in accordance with the provisions of sections 931-938 of this title, they may be included.

**Designation of land for church, park, playground, or cemetery**

(b) The tribal council shall designate any part of the tribe's land that is to be set aside for church, park, playground, or cemetery purposes and the Secretary is authorized to convey such tracts to trustees or agencies designated by the tribal council for that purpose and approved by the Secretary.

**Appraisal of assets; improvements**

(c) The remaining tribal assets shall be appraised by the Secretary and the share of each member shall be determined by dividing the total number of enrolled members into the total appraisal. The tribal assets so appraised shall not include any improvements that were placed on the part of an assignment that is selected by an assignee, or his wife or children, pursuant to subsection (d) of this section. Such improvements shall be property of the assignee.

**Assignee's option of selection; approval of selection by Secretary; title to assignment**

(d) Subject to the provisions of this subsection, each member who is an adult under the laws of the State and who has an assignment shall be given the option of selecting and receiving title to any part of his assignment that has an appraised value not in excess of his share of the tribe's assets. A wife, husband, or child of such adult member may select and receive title to any part of such assignment that has an appraised value not in excess of her or his share of the tribe's assets; and, if the child is a minor under the laws of the State, the option on his behalf may be exercised by such adult member. Each selection shall be subject to the approval of the Secretary of the Interior, who shall consider the effect of the selection on the total value of the property. The title to any part of an assignment so selected may be taken in the name of the person entitled thereto, or the title to all or the parts of an assignment so selected may be taken in the names of the persons entitled thereto as tenants in common.

**Selection by members having no assignment**

(e) Each member who has no assignment may select and receive title to any part of the tribal land that is not selected pursuant to subsection (d) of this section and that has an appraised value not in excess of his share of the tribe's assets.

**Sale and distribution of proceeds of assets not selected; bidding; member purchases; disposition of unsold assets**

(f) All assets of the tribe that are not selected and conveyed to members pursuant to subsections (d) and (e) of this section shall be sold and the proceeds distributed to the members in accordance with their respective interests. Such sales shall be by competitive bid and any member shall have the right to purchase property



offered for sale for a price not less than the highest acceptable bid therefor. If more than one member exercises such right, the property shall be sold to the member exercising the right who offers the highest price. Any tribal assets that are not sold by the Secretary within two years from the date of the notice provided for in section 931 of this title shall be conveyed to a trustee selected by the Secretary for disposition in accordance with this subsection, and the fees and expenses of such trustee shall be paid out of funds appropriated for the purposes of sections 931-938 of this title. Pub.L. 86-322, § 3, Sept. 21, 1959, 73 Stat. 592.

**§ 934. Land surveys and execution of conveyances by Secretary; title of grantee**

The Secretary of the Interior is authorized to make such land surveys and to execute such conveyancing instruments as he deems necessary to convey marketable and recordable titles to the tribal assets disposed of pursuant to sections 931-938 of this title. Each grantee shall receive an unrestricted title to the property conveyed. Pub.L. 86-322, § 4, Sept. 21, 1959, 73 Stat. 593.

**§ 935. Revocation of tribal constitution; termination of Federal services; application of Federal and State laws; citizenship status unaffected**

The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in sections 931-938 of this title,

however, shall affect the status of such persons as citizens of the United States. Pub.L. 86-322, § 5, Sept. 21, 1959, 73 Stat. 593.

**§ 936. Rights, privileges, and obligations under South Carolina laws unaffected**

Nothing in sections 931-938 of this title shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina. Pub.L. 86-322, § 6, Sept. 21, 1959, 73 Stat. 593.

**§ 937. Taxes; initial exemption; taxes following distribution; valuation for capital gains or losses**

No property distributed under the provisions of sections 931-938 of this title shall at the time of distribution be subject to any Federal or State income tax. Following any distribution of property made under the provisions of sections 931-938 of this title, such property and income derived therefrom by the distributee shall be subject to the same taxes, State and Federal, as in the case of non-Indians: *Provided*, That for the purpose of capital gains or losses the base value of the property shall be the value of the property when distributed to the grantee. Pub.L. 86-322, § 7, Sept. 21, 1959, 73 Stat. 593.

**§ 938. Education and training program; purposes; subjects; transportation; subsistence; contracts; other education programs**

Prior to the revocation of the tribal constitution provided for in sections 931-938 of this title, the Secretary is authorized to undertake, within the limits of available appropriations, a special program of education and training designed to help the members of the tribe to earn a livelihood, to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians. Such program may



include language training, orientation in non-Indian community customs and living standards, vocational training and related subjects, transportation to the place of training or instruction, and subsistence during the course of training or instruction. For the purposes of such program, the Secretary is authorized to enter into contracts or agreements with any Federal, State, or local governmental agency, corporation, association, or persons. Nothing in this section shall preclude any Federal agency from undertaking any other program for the education and training of Indians with funds appropriated to it. Pub.L. 86-322, § 8, Sept. 21, 1959, 73 Stat. 594.

## EXHIBIT G

**The Nonintercourse Act**
**25 U.S.C. § 177 (1976)**

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**§ 177. Purchases or grants of lands from Indians**

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

(R.S. § 2116.)

No. 84-782

In The

# Supreme Court of the United States

October Term, 1984

STATE OF SOUTH CAROLINA, et al.,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## RESPONDENT TRIBE'S BRIEF IN OPPOSITION

DON B. MILLER
*Counsel of Record*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK, RAVENEL, TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 327-1179

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

## QUESTIONS PRESENTED

(1) Whether Congress intended the 1959 Catawba Division of Assets Act, which was specifically drafted to leave the Catawba Tribe's Treaty claim unaffected, to nonetheless have the effect of implicitly terminating the claim—thereby denying the Tribe its first and only opportunity to present its claim to the courts and repudiating an express agreement with the Tribe by the Department of the Interior and the Tribe's Congressman that the bill they drafted would not be used to deny the Tribe its day in court.

(2) Whether Congress intended the 1959 Catawba Division of Assets Act, wherein Congress specifically provided for the distribution among tribal members of 3,434 acres acquired administratively in 1943, to have the additional effect of terminating, without mention, the federally-protected status of an additional 140,000 acres which comprise the Catawba Tribe's 1763 Treaty Reservation.

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## STATEMENT OF THE CASE

### I. Nature Of The Case

In 1760 and 1763, the King of England entered into treaties with the Catawba Indian Tribe whereby the Tribe ceded vast portions of its aboriginal territory in return for being secured in possession of a 15 mile square reservation. In 1840 the State of South Carolina, without federal participation or approval, negotiated a "sale" of the Reservation, promising it would purchase a new reservation for the Tribe. South Carolina took possession of the Treaty Reservation but failed to acquire a new reservation for the Tribe. In 1842, after the Tribe had wandered homeless for almost three years, the State bought back a 630-acre tract of the original Reservation as a "new" reservation for the Tribe. The State continues to this day to hold this tract in trust for the Tribe.

In 1980, after more than 80 years of unsuccessful efforts to resolve its claim legislatively and administratively[1] the Tribe brought suit seeking the return of its Treaty Reservation. The Tribe seeks a declaration that it acquired a recognized property right through its treaties with the King and that since the adoption of the Constitution, its reservation lands have been protected by federal law. As a result, the 1840 Treaty between the State and the Tribe is void and the subject lands retain to this day their status as an Indian reservation.

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[1]For example, the Catawba Tribe twice petitioned the Department of the Interior, in 1905 and 1908, to take legal action to resolve the Tribe's 1763 Treaty claim. The Tribe's petitions were based on the Nonintercourse Act but were rejected because the Catawbas were "state Indians" for whom the United States had no responsibility. Appeals Record at 185, 189.

## II. The Proceedings Below And The Issues For Review

The district court, on agreement of the parties, initially postponed filing of answers to the complaint until after resolution of the Tribe's motion to certify the defendant class. Thereafter, the district court stayed consideration of the motion to certify the defendant class in favor of first considering petitioners' motion for summary judgment based solely on the effects of the 1959 Catawba Division of Assets Act. 73 Stat. 592, 25 U.S.C. §§ 931-938 (1976). The district court then granted summary judgment for petitioners by adopting verbatim their proposed findings of fact and conclusions of law.

For purposes of the summary judgment motion, petitioners assumed that, until the effective date of the 1959 Act, the Catawba Tribe possessed a vested, constitutionally-protected property right in its Treaty Reservation. They further assumed that the Reservation was subject to the same federal constitutional and statutory protection as other federal treaty reservations and that neither the Tribe's property interest nor its federally-restricted status was validly disturbed until 1959.

The question thus presented for summary judgment was whether the 1959 Act had the effect of implicitly terminating the federally-protected status of the 1763 Treaty Reservation by a general application of state law or by implicitly ratifying the 1840 state treaty.

## III. Statement Of Facts

The 1959 Act of Congress at issue here ended a unique and limited relationship undertaken in 1943 between the State of South Carolina, the United States and the Catawba Tribe. In that year the United States, the State and the Tribe entered into a Memorandum of Understanding for the purposes "of promoting the rehabilitation of the said Indians," Mem. of Understanding, p. 1, Appeals Record at 309, and "insur[ing] the members of the Catawba Indian Tribe all the rights and privileges of any other citizen of South Carolina," Mem. of Understanding, p. 3, Appeals Record at 311. The limited nature of the 1943 relationship is demonstrated clearly by the Committee Report on the 1959 Act:



> Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the Federal Government.

H.R. Rep. No. 910, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2673. It is significant that the State had attempted to secure an extinguishment of the Tribe's treaty claim as a condition to its participation in the 1943 agreement, but that proposal was specifically rejected by the Interior Department.[2]

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[2]During negotiations of the 1943 Memorandum, the State had sought inclusion of a section that would have extinguished the Tribe's 1763 Treaty Reservation claim. Appeals Record at 287-303. The Department of the Interior had investigated the

(Continued on next page)

Pursuant to the 1943 Memorandum, the State purchased 3,434 acres of land close to the existing 630-acre state reservation and conveyed it to the Secretary of the Interior in trust for the Tribe. The State did not convey the 630-acre tract to the Secretary.

In the 1950's federal Indian policy shifted toward termination of the special relationship between tribes and the United States. Federal funding for the Catawba Tribe decreased, and as a result much of the newly-acquired land could not be productively used for homes or farming. Appeals Record at 337, 339-49. Federal restrictions precluded encumbering the land to secure financing. When the Tribe sought a solution, Interior Department Officials suggested removing federal restrictions from the land and distributing it in fee among tribal members. Appeals Record at 317-36, 339-49.

The Bureau of Indian Affairs (BIA) appointed a Special Program Officer to secure tribal consent to the distribution program. Appeals Record at 483. At no time during the entire legislative process was the Tribe represented by counsel. When Catawba leaders stated they would not agree to dividing the federal assets unless the Tribe's 1763 Treaty claim was preserved, the Program Officer assured them "that any claim the Catawbas had

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(Continued from previous page)

Tribe's claim, however, and documented the State's failure to abide by the 1840 treaty. Appeals Record at 248. Thus, in 1941, Interior advised the State that it would not "be a party to any action seeking to quiet these claims." Appeals Record at 295. *See* Mem. Sol. Int., Jan. 13, 1942, "Re The Memorandum of Understanding, Etc.," *reprinted in* I Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974. Appeals Record at 304.



against the State would not be jeopardized by carrying out a program with the Federal Government [for the distribution of assets]." Appeals Record at 323. The BIA drafted the Tribe's January 3, 1959 consenting resolution, which was based entirely on the inability of members to "obtain credit to build homes, . . . claim ownership of the property . . . " or to improve or develop the property. Appeals Record at 337. The final clause of the resolution conditioned tribal consent on leaving the claim unaffected:

> . . . nothing in this legislation shall affect the status of any claim against the state of South Carolina by the Catawba Tribe.

Shortly thereafter, the Tribe's Congressman requested the BIA to draft legislation "to accomplish the desires [of the Tribe] set forth in the Resolution." Appeals Record at 338. Two months later, on March 28, 1959, the Congressman presented a draft bill to the Tribe stating that he had had the "legislation drawn up to carry out the intent of the resolution." Appeals Record at 502. Likewise, the Associate Commissioner of Indian Affairs testified to Congress that "we drafted a bill along the lines that we thought the Indians had been discussing." Hearings on H.R. 6128, House Committee on Interior and Insular Affairs (1959) (unpublished).

The House and Senate committee reports are virtually identical and state that the Act's purpose is to "provide for the division of assets of the . . . Tribe . . . among its . . . members. . . . The assets consist principally of the Tribal land which comprises nearly 4,000 acres. . . . " H.R. Rep. 910, *supra*, 1959 U.S. Code Cong. & Ad. News 2672. The committee reports, like the Act itself, do not mention the 1763 Treaty claim. They do, however, plainly

show that Congress was relying on the Tribe's consent expressed in the January 3 and March 28 resolution and meeting. *Id.*

The Committee Reports establish that the relationship that was the object of the 1959 Act was *only* that undertaken pursuant to the 1943 Memorandum of Understanding:

> The Catawba Indians' relations with the Federal Government date back only to the 1940's. . . .
>
> Since 1943 the State, the Bureau of Indian Affairs and the tribe have been working together to improve the economic conditions of the members.

*Id.* The reports further establish that the only land to be affected by the Act was that acquired pursuant to the 1943 agreement:

> In accordance with the memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and by warranty deed dated October 5, 1945, the State conveyed the land to the United States in trust for the tribe. It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.

H.R. Rep. 910, *supra,* 1959 U.S. Code Cong. & Ad. News 2673.

Finally, the formal notice sent by the Secretary of the Interior to the Governor of South Carolina and the Chief of the Tribe demonstrates that the scope of the 1959 Act was limited to withdrawal from the 1943 Memorandum of Understanding:

> NOTICE
>
> Whereas, the Act of September 21, 1959 (73 Stat. 592), provides that special services performed by the United States for Catawba Indians because of their status as Indians shall be terminated on the date of revocation of the tribe's constitution; and
>
> Whereas, the Bureau of Indian Affairs has performed services to the Catawba Indians pursuant to a Memorandum of Understanding entered into with the Tribe and the State of South Carolina on December 14, 1943; and
>
> Whereas such Memorandum of Understanding is to be rendered ineffectual by the Act of September 21, 1959, *supra,* and since no term was agreed upon in the Memorandum of Understanding.
>
> Now therefore, the Secretary of the United States Department of the Interior hereby gives notice of intention to withdraw from and conclude the Department's responsibilities under the agreement approved December 14, 1943.
>
> The effective date of withdrawal shall be July 1, 1962.
>
> (sgd) John A. Carver, Jr.
> Secretary of the Interior

Appeals Record at 350, 544.

Pursuant to the 1959 Act, federal restrictions were removed from the 3,434 acres and the land, or proceeds from its sale, was distributed among tribal members. The Tribe continues to reside to this day on the 630-acre tract held in trust by the State of South Carolina.



## REASONS FOR DENYING THE WRIT

### I. The Ruling Below Upheld The Federal Government's 1959 Commitment To Allow The Tribe Its Day In Court.

The events leading up to and surrounding enactment of the 1959 Act show clearly that the federal government

expressly agreed that the Act would not be used to deprive the Tribe of the opportunity to present its case to the courts. The Fourth Circuit's ruling construes the 1959 Act in a manner that honors the government's promise. Petitioners seek to have this Court rule that Congress repudiated that agreement without any mention whatsoever, all the while purporting to be acting consistently with the Tribe's wishes and for the Tribe's benefit. As justification for this remarkable result, petitioners raise the specter of untold suffering visited upon thousands of innocent landowners by the mere existence of the tribal claim and the threat of eventual ejectment.[3]

Seen in proper perspective, petitioners' arguments are simply an effort to bar the courthouse door to a Tribe that has never before had the opportunity to present its claim for judicial resolution and which will be left with nothing save a barren 630-acre tract should petitioners prevail.

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[3]The Tribe sharply disputes petitioners' representations that this claim has placed an "immense burden" of "uncertain title" on "thousands of families and businesses." Petition at 9, n. 14. There is certainly no indication that the Fourth Circuit's ruling on the 1959 Act has resulted in clouded land titles of "whole communities" or "depressed" property values. Petition at 8. On May 8, 1984, nearly 7 months after the Fourth Circuit's panel decision of October 11, 1983, the Rock Hill Evening Herald, published by named defendant Herald Publishing Company, reported that in March 1984 the value of overall construction activity in York County reached its highest monthly total ever, *i.e.*, "476 percent above the levels of a year ago." The massive boost was provided by construction activity within the claim area by another named defendant, Church Heritage Village and Missionary Fellowship. The article also reported that building activity in the City of Rock Hill (also within the claim area) "exceeded March '83 totals by 286 percent." Appendix, Exhibit A, p. 1a.



**II. Review At This Time Would Be Premature: The Complaint Has Not Been Answered And A Defendant Class Has Not Been Certified.**

This appeal is interlocutory; a defendant class has not been certified and no answers to the complaint have been filed. While petitioners rely heavily on the importance of this case to the affected landowners, no record has been developed as to any economic disruption or hardship caused by this claim to date. The merits of the case have not been reached and petitioners have consistently noted throughout these proceedings that they intend to propound numerous defenses. *See, e.g.*, Petition at 4, n. 7.[4]

Should the Tribe prevail on liability issues, it is likely that a federal court would fashion a remedy that would take into account the "impossibility" of repossession. *See* discussion in Judge Murnaghan's concurring opinion, Petition at 30a, and cases cited.

**III. Congressional Policy Is Against Permitting Private Landowners To Be Ejected: Petitioners' Fears Of Armageddon Arising Out Of The Lower Court's Ruling Permitting The Tribe Access To The Courts Are Unfounded Because Congress Will Certainly Settle This Claim If It Proceeds To The Merits.**

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[4]*See also* Appellees' Brief below at 4, n. 6:

> defendants . . . [dispute] whether the Catawbas had any enforceable interest in the land at issue, whether the Catawbas had ever been a tribe under federal law, whether the land at issue could be identified with sufficient precision, whether a proper defendant class could be identified, whether there is an implied right of action under the Nonintercourse Act, whether the United States was notified in advance of the 1840 treaty and consented to it, and whether the Nonintercourse Act covered the Catawbas or the land at issue.

In recent years Congress has been active in settling major Indian land claims by implementing consensual settlement agreements.[5] These legislative settlements have been facilitated by lower federal court rulings that struck down preliminary defenses and to some degree affirmed the legitimacy of the tribal claims.[6] Indeed, the legislative history of each Eastern Indian land claim settlement act attributes the need for the legislation to the perceived credibility of the tribal claim.[7]

The recent experience of the Catawba Tribe demonstrates that its claim, like those of other Eastern Indian tribes, cannot be fairly settled without benefit of judicial interpretation.[8] Should the case now proceed to the merits,

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[5]*See* Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. § 1701; Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1721 (Indian claim to roughly one-half the State of Maine); 1983 Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1751.

[6]*See* Narragansett Tribe of Indians v. So. R.I. Land Development Corp., 418 F.Supp. 798 (D.R.I. 1976); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F.Supp. 780 (D.Conn. 1976).

[7]*See* H.R. Rep. No. 95-1453, 95th Cong., 2d Sess. 7-9, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1948; H.R. Rep. No. 96-1353, 96th Cong., 2d Sess. 12-13, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3786; S. Rep. No. 98-222, 98th Cong., 1st Sess. 7-8.

[8]In 1976, in an effort to establish the credibility of the tribal claim without resorting to litigation, the Tribe renewed its 1908 request to the United States to initiate litigation on its behalf to recover the Treaty Reservation. One year later the Solicitor of the Department of the Interior concluded that the Tribe

(Continued on next page)



however, it is likely that settlement efforts will resume and this claim will be settled by Congress as have other Eastern Indian land claims.

## IV. The Ruling Below Will Not Create Uncertainty As To Other Terminated Tribes Or Indians.

### A. This Court and Other Lower Courts Have Already Established That Treaty-Protected Property Rights May Survive Termination.

Petitioners urge that review be granted because the decision below may permit terminated Indians to assert federal Indian rights. However, no uncertainty is created by the opinion below because this Court has already ruled that termination does not necessarily extinguish treaty property rights that are not necessarily or expressly included within the scope of the termination legislation. *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (termination act's general application of state law insufficient to accomplish extinguishment of treaty right to hunt and fish free of state law). Lower court decisions have

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could establish a prima facie Nonintercourse Act claim and formally requested the Department of Justice to initiate legal action—but only in the event that efforts already underway to reach "an amicable, orderly settlement" should fail. District court record, Jan. 20, 1981, N.R. 10, Vol. I, p. 4, Attachment to Plaintiff's Memorandum in Response to Defendants' Memorandum in Response to Status Conference Order. Appendix, Exhibit B, p. 3a. Thereafter, two tribal settlement initiatives, resulting in detailed settlement proposals very similar to those enacted by Congress for other Eastern Indian tribes, see n. 5, *supra*, were rejected. Hearings on H.R. 3274, Hse. Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 30-36, June 12, 1979; Hearings on H.R. 5494, Hse. Comm. on Interior and Insular Affairs, 97th Cong., 2d Sess., June 22, 1982 (unpublished).

followed this Court's ruling in *Menominee*. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (Klamath Indian treaty rights to hunt and fish free of state regulation survive termination); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied sub nom., United States v. Oregon*, — U.S. —, 52 U.S.L.W. 3906 (1984) (Klamath Indian treaty water rights survive termination).

### B. The Fourth Circuit's Construction Of The 1959 Act Turns On Unique Historical Facts And Circumstances.

The ruling below turns on the unique history of the Catawbas' 16-year relationship with the federal government and the particular actions and assurances of the drafting agency and the bill's sponsor. No other terminated tribe had so brief and limited a relationship with the United States. The 1943 Agreement was limited to merely providing economic assistance to rehabilitate tribal members and the Tribe's treaty claim was intentionally left outside the scope of that relationship. The 1959 Act was likewise limited, not only by virtue of the limited nature of the obligations undertaken in 1943, but also by the assurances of the Bureau of Indian Affairs, the expressed understanding of the Tribe, the assurances of the Act's sponsor, and the reliance expressed by Congress on the understanding and consent of the Tribe. These are factors that are unique to the 1959 Catawba Act and form an integral basis of the decision below.

### C. The Ruling Below Turns On Unique Statutory Language.

The language of the Catawba Division of Assets Act was unique in several respects that would preclude appli-



cation of the Fourth Circuit's construction to other terminated tribes. The Fourth Circuit held that the relevant provisions of § 5 of the 1959 Act applied only to individual Catawba Indians and not to the Catawba Tribe. Thus, the applicability of the Nonintercourse Act to *tribal* treaty rights was not affected by the provision that states "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them." 25 U.S.C. § 935. This holding is unlikely to have application beyond the present case because the language rendering Indian statutes inapplicable in each of the other termination acts is significantly different from that in the Catawba Act.

In eight of the twelve termination acts, Congress specifically provided that federal Indian statutes "shall no longer be applicable *to the members of the tribe.*"[9] Plainly, the result for those tribes would be identical to that reached by the Fourth Circuit here without regard to the ruling in this case. In the Alabama-Coushatta and Ponca termination acts, Congress expressly provided that federal Indian statutes would no longer apply to *both* the tribe and its members.[10] Once again, the Fourth Circuit's analysis of § 5 of the Catawba Act would appear to have

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[9]25 U.S.C. §§ 564q; 677v; 703; 757(a); 803; 823; 848 and 899 (emphasis added).

[10]In the Alabama-Coushatta Act, Congress provided that federal Indian statutes "shall no longer be applicable to the Alabama-Coushatta Tribes of Texas or the members thereof . . ." 25 U.S.C. § 726. In the Ponca Act, Congress provided that "all statutes of the United States that affect Indians or Indian tribes because of their Indian status shall be inapplicable . . ." 25 U.S.C. § 980.

no application.[11] In the 1958 California Rancheria Act, the only termination act containing language identical to that in the 1959 Catawba Act rendering federal Indian statutes inapplicable, the entirety of the comparable section deals only with individual Indians. Section 10(b), 72 Stat. 619, 621. *See* n. 12, *infra.*

Similarly, the clause in § 5 of the Catawba Act that applies state law is significantly different from that contained in any other termination act. In each of the nine other termination acts that affected both an Indian tribe and is members,[12] Congress expressly provided that state laws would thereafter apply to *both* the affected "tribe and its members" in the same manner as they apply to

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[11]Assuming *arguendo* that § 5 of the Catawba Act rendered federal Indian statutes inapplicable to both the Catawba Tribe and its members, it does not follow that Nonintercourse Act restrictions on the Tribe's Treaty Reservation were thereby lifted. This Court has held that a similar section of the Menominee Termination Act, 25 U.S.C. § 899, that rendered federal Indian statutes inapplicable and state law applicable, was limited to the withdrawal of federal supervision only. Menominee Tribe v. United States, 391 U.S. 404 (1968). In each termination act, Congress lifted federal restrictions on the lands subject to the act in a different section from that ending federal supervision. Thus, Congress lifted federal restrictions on the lands to be affected by the Catawba Act in § 4 of that Act, 25 U.S.C. § 934, and ended federal supervision in § 5.

[12]Two termination acts were directed primarily at individual Indians, not Indian tribes. The Mixed-Blood Ute Termination Act, 25 U.S.C. § 677, terminated certain tribal members but left the Ute Tribe and its full-blood members largely unaffected. The comparable section of the California Rancheria Act dealt exclusively with individual Indians. 72 Stat. 619, § 10(b). *See* S. Rep. No. 1874, 85th Cong., 2d Sess. 3 (1958) (Membership rolls not prepared because "groups not well-defined," "lands . . . for the most part . . . acquired . . . by United States for Indians in California generally rather than for a specific group . . . ," and assets distributed according to plans developed or approved by "administratively selected users of the land.").



other citizens or persons.[13] In the 1959 Act, however, Congress provided that state law would thereafter apply to "them," referring only to individual Catawba Indians. 25 U.S.C. § 935.[14]

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[13]*See* 25 U.S.C. §§ 564; 703; 726; 757; 803; 823; 848; 899 and 980.

[14]That the applicability of the relevant clauses of § 935 was limited to individual Indians is demonstrated by comparing the 1959 Catawba Act with its immediate predecessor, the 1958 California Rancheria Act, 72 Stat. 619, and its immediate successor, the 1962 Ponca Termination Act, 25 U.S.C. §§ 971-980. Section 10(b) of the California Rancheria Act (the provision comparable to § 935 of the Catawba Act) by its terms applies only to individual Indians. Appendix, Exhibit C, p. 7a. There, Congress used the language "all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them." In contrast, the comparable provision of the 1962 Ponca Termination Act, 25 U.S.C. § 980 (Appendix, Exhibit D, p. 8a), applies to both individual Indians and Indian Tribes. Thus, Congress used the language "all statutes of the United States that affect Indians *or Indian tribes* because of their Indian status shall be inapplicable to them." (Emphasis added). If Congress had intended the term "Indians" to encompass "Indian tribes," there would have been no need to insert the words "or Indian tribes" in the second sentence of § 980.

When § 5 of the 1959 Catawba Act (Appendix, Exhibit E, p. 8a) is compared with these two acts, it becomes apparent that Congress selectively applied only the first sentence and the first clause of the second sentence of § 5 to the Catawba Tribe. Section 5 of the Catawba Act, like § 10(b) of the California Act, provides that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them." Indeed, with the exception of the description of who shall henceforth be ineligible for federal services, the relevant provisions of the Catawba Act are identical to those of the 1958 California Act, which by its terms applies only to individual Indians.

In 1962, when Congress sought to further broaden the applicability of the section and ensure that the Ponca Tribe, as well as its members, would be included among those to whom Indian statutes would no longer be applicable and to whom

(Continued on next page)

### D. The Catawba Tribe Was The Only Eastern Indian Tribe To Be Terminated And Congress Has Restored The Trust Relationship To Most Of The Western Terminated Tribes.

The Catawba Tribe was the only Eastern Indian Tribe to be terminated. Of the remaining 11 western termination acts, only nine were directed primarily at both tribes and their members. Since 1973, Congress has restored the federal trust relationship to the tribes and Indians affected by six of these termination acts. *See* 25 U.S.C. §§ 903 (Menominee); 861 (Wyandotte, Ottawa, Peoria); 761-768 (Southern Paiute); 711 and 713 (Siletz and Grand Ronde, the principal tribes affected by the Western Oregon Termination Act).

### E. The Catawba Termination Act Was Enacted Under A Revised Policy That Emphasized The Understanding And Consent Of The Affected Indians.

The precedential applicability of the ruling below to other terminated tribes is further eroded by the fact that

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state law would apply, it specifically included the words "or Indian tribe" after the word "Indians."

This analysis is confirmed by comparison of the final sentences of each of the sections quoted above preserving the citizenship status of individual Indians under the Indian Citizenship Act of June 2, 1924, ch. 233, 43 Stat. 253. Both the California and Catawba Acts leave the citizenship status of "such persons" unaffected. "[S]uch persons" necessarily refers to the individuals in the preceding sentence to whom state law would henceforth apply. In the Ponca Act, however, because federal Indian statutes had been rendered inapplicable and state law made applicable to "Indians or Indian tribes," Congress was unable to refer to the subject of the previous sentence to protect the citizenship rights of individuals as it had done in the California and Catawba Acts. Rather, it was necessary to refer to the citizenship status of "any Indian."



the 1959 Catawba Act was enacted pursuant to a modified, softened federal termination policy. In 1958 Congress and the Eisenhower administration rejected the coercive termination policy that underlay the first nine termination acts passed by Congress in 1954 and 1956. F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.). The revised policy placed special emphasis on both the Indians' understanding and consenting to termination, *id.* Thus, unlike earlier termination acts, Congress expressly conditioned implementation of the final three termination acts on the formal consent of the affected Indians or tribes. *See* 72 Stat. 619, § 2(b) (California Rancheria, 1958); 25 U.S.C. § 931 (Catawba, 1959); 25 U.S.C. § 971 (Ponca, 1962).[15]

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[15]The 1959 Catawba Act was further unique in that the expressed congressional purpose of every other termination act that affected both tribes and their members was, *e.g.*, "to provide for the *termination* of Federal supervision over the trust and restricted property of the . . . Tribe . . . ." 25 U.S.C. § 564 (emphasis added); see 25 U.S.C. §§ 691; 741; 791; 821; 841; 891; H.R. Rep. No. 2491, 83d Cong., 2d Session. 1, *reprinted in* 1954 U.S. Code Cong. & Ad. News 3119; and H.R. Rep. No. 2076, 87th Cong., 2d Sess. 1 (1962). In contrast, the stated purpose of the 1959 Act was "[t]o provide for the division of the tribal assets of the Catawba Indian Tribe . . . "73 Stat. 592; H.R. Rep. No. 910, *supra*. Indeed, neither the word "terminate" nor any of its derivations appears once in the Catawba Act as it does in each of the other termination acts. See 73 Stat. 592. While the Tribe does not argue therefrom that the Catawba Act is not a "termination" act, it certainly suggests that Congress legislated with the particular circumstances of the Catawba Tribe in mind and further weakens the link between the 1959 Act and the assimilationist policy pronouncements attending the advent of the termination era in the early 1950's. *See* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), *quoted with approval in* Bryan v. Itasca County, 426 U.S. 373, 388, n. 14 (1976) ("Courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected . . .' ").

## V. The Ruling Below Does Not Conflict With Decisions Of This Court Or Other Courts Of Appeals: No Court Has Ever Held That Termination Extinguishes Or Diminishes An Undistributed Tribal Property Right.

Each of the decisions with which the opinion below is alleged to conflict involved either the status of individual Indians[16] or the application of state law to the distributed or allotted property of individual Indians.[17] However, the

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[16]In United States v. Antelope, 430 U.S. 641 (1977), this Court commented that individual terminated Indians are subject to state criminal laws. In Bryan v. Itasca County, 426 U.S. 373, 389 (1976), this Court noted that termination acts subjected Indians, as individuals, as well as their "distributed property . . . 'to the same taxes . . . as in the case of Non-Indians.'" United States v. Heath, 509 F.2d 16 (9th Cir. 1974), involved the status of an individual Indian for purposes of a criminal prosecution.

[17]In Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972), this Court held that the Ute termination act, 25 U.S.C. § 677, ended federal responsibility for individual Indian property (stock shares) that had been distributed under the act. "The UDC stock itself, however, was free of restriction; as to it, federal termination was complete." 406 U.S. at 150. Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981) also involved application of state law to the distributed property of an individual Indian.

Schrimpscher v. Stockton, 183 U.S. 290 (1902), likewise involved the application of state law to determine rights in the allotted lands of an individual Indian, as did Dickson v. Luck Land Co., 242 U.S. 372 (1917); Dennison v. Topeka Chambers Indus. Dev. Corp., 724 F.2d 869 (10th Cir. 1984); and Dillon v. Antler Land Co., 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975). *Compare* Capitan Grande Band of Mission Indians v. Helix Irrig. Dist., 514 F.2d 465 (9th Cir. 1975), *cert. denied*, 423 U.S. 874, where the Ninth Circuit expressly declined to follow its *Dillon* ruling and refused to apply state statutes of limitations to tribal property. "Our recent decision in Dillon . . . is distinguishable in that it involved the applica-

(Continued on next page)



Fourth Circuit in this case did not hold, and the Tribe has never contended, that state law does not now apply to individual Catawba Indians as well as to any former tribal property that was the subject of and actually distributed pursuant to the 1959 Act. No conflict in decisions exists because the right at issue in this case is a *tribal* right to *undistributed* property intentionally left outside the scope of the 1959 Act. No decision of this Court or a court of appeals has ever held that termination legislation resulted in the extinguishment of treaty property rights or the

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(Continued from previous page)

tion of Montana statutes of limitations to land owned by an Indian in fee simple, which had lost its character as a trust property interest entitled to federal protection." 514 F.2d at 468, n. 6.

This Court and Congress have consistently distinguished between lands allotted to Indian individuals and undivided tribal property. In 1834 Congress removed the lands of individual Indians from federal protection under the Nonintercourse Act. Jones v. Meehan, 175 U.S. 1, 12 (1899). Because allotted lands are destined to eventually become unrestricted private property, they assume many of the incidents of state law prior to the final lifting of federal restrictions. Thus, absent an allegation of jurisdiction under 25 U.S.C. § 345, the right of possession of a restricted allotment is a matter for state courts. Taylor v. Anderson, 234 U.S. 74 (1914). The question of *tribal* rights to land, however, is exclusively federal in nature. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). In *Oneida* the Court explained the distinction between individual Indian land and tribal land for federal jurisdictional purposes:

> In Taylor [v. Anderson], the plaintiffs were individual Indians, not an Indian Tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands . . . Individual patents had been issued with only the right to alienation being restricted for a period of time . . . Once patent issues, the incidents of ownership are, for the most part, matters of local property law . . .

*Id.* at 676 (citations omitted).

termination of reservation status of undistributed tribal lands left unaffected by the act.[18]

However, in *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968), this Court did construe a provision similar to § 935 of the Catawba Act and squarely ruled that Congress did not intend the meaning asserted by petitioners here. *Menominee* rejected arguments that the general application of state law, in that case, to both "the tribe and its members," 25 U.S.C. § 899, resulted in an extinguishment of the treaty property right to hunt and fish free of state law. The Menominee Termination Act mentioned neither preservation nor extinguishment of the right and this Court held that the Act's general application of state law was insufficient to accomplish an indirect abrogation. The *Menominee* Court specifically held

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[18]See Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 139 (1972); "The termination proclamation . . . did not purport to terminate the trust status of the undivided assets. Cf. Menominee Tribe v. United States . . ." The *Affiliated Ute* Court further noted that the termination proclamation, "[t]*o the extent the nature of the property so permitted,* . . . marked the fulfillment of the purpose set forth in § 1 of the Act, 25 U.S.C. § 677, namely, the termination of federal supervision over the trust and restricted property of the mixed-bloods." 406 U.S. at 149-150 (emphasis added). The Court's analysis of the legislative scheme of the Ute termination act likewise fully supports the Fourth Circuit's ruling in this case:

> After each mixed-blood had received his distributive share, directly or in whole or in part through the devise of a corporation or other entity in which he had an interest, *federal restrictions were to be removed except as to any remaining interest in tribal property,* that is, *the unadjudicated or unliquidated claims* against the United States, gas, oil, and minerals rights, *and other tribal assets not susceptible of equitable and practicable distribution.* § 16, 25 U.S.C. § 677o.

406 U.S. at 135 (emphasis added).



that the provisions of § 899 of the Menominee Act providing for application of state law and inapplicability of federal Indian statutes were limited in their application to the withdrawal of federal supervision, 391 U.S. at 412.[19]

Indeed, every court that has examined the apparently broad application of state law provisions contained in termination-era legislation has construed the provisions narrowly to accomplish only the particular purposes of the act. In *Bryan v. Itasca County,* 426 U.S. 373 (1976), this Court construed the section of Public Law 280 directing that state civil laws "of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere within the State . . .," 28 U.S.C. § 1360(a). At issue was the applicability of state personal property tax laws to the property of individual Indians located on restricted trust land. This Court unanimously held that § 1360(a) did not subject Indians to all state laws of general application. Rather, after examining the legislative history and overall purpose of the Act, and carefully distinguishing between the effects of the Act on tribes and its effect on individual

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[19]The distinction between the termination of federal supervision over individual Indians and the abrogation of treaty rights by application of state law to tribal property left outside the scope of the termination act is drawn clearly by two Ninth Circuit decisions construing the Klamath Termination Act. In Kimball v. Callahan, 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974), the court held that the general application of state law to "the tribe and its members" did not extinguish the undistributed tribal right to hunt and fish free of state law. Shortly after *Kimball,* the Ninth Circuit decided United States v. Heath, 509 F.2d 16 (1974), and held that the termination act's general application of state law did extinguish the federal Indian status of an individual Klamath Indian for purposes of criminal prosecution.

Indians, 426 U.S. at 389, it was determined that § 1360(a) was limited to applying state law as rules of decision in state court private civil legal disputes.[20]

### VI. The Fourth Circuit's Interpretation Of The 1959 Act Follows Well-Established Rules Of Construction.

Petitioners claim that the 1959 Catawba Act is so clear on its face as to preclude reliance on anything other than the language of the statute itself. However, because the Act does not mention this claim or the Tribe's Treaty Reservation, the Fourth Circuit applied this Court's mandate that "[a] congressional determination to terminate must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).[21] The ruling be-

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[20]See Capitan Grande Band of Mission Indians v. Helix Irrigation District, 514 F.2d 465 (9th Cir. 1975), *cert. denied*, 423 U.S. 874, where the appeals court held that the same Public Law 280 provision did not apply state statutes of limitations to bar a *tribal* claim for trespass damages on reservation land.

[21]The Fourth Circuit's narrow construction of the word "Indians" in § 5 of the Catawba Act is required by this Court's refusal "to infer an intent to terminate." *Mattz, supra*, at 504. Petitioners attack the lower court's construction of "Indians," however, on the basis that Congress used the words "Indians" and "Indian tribes" interchangeably in the 1834 Trade and Intercourse Act. Petition at 22-24. But whether Congress may have so used the terms in 1834 is irrelevant. It is clear that Congress in 1834 removed the lands of individual Indians from Nonintercourse Act protection, Jones v. Meehan, 175 U.S. 1, 12 (1899), and that therefore the Act under which the Catawba Tribe is now proceeding is an act that protects only the lands of Indian tribes. At issue here is whether Congress *in 1959* distinguished between how termination would affect Indians as individuals and Indian tribes. Even a cursory examination of the language of each termination act discloses that Congress expressly and consistently distinguished between "Tribes" and "Indians." *See* Section IV C, *supra*.



low recognized that absent expression of contrary intent by Congress, the clear intent of the bill's drafting agency and sponsor to leave this claim unaffected controls. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656-58 (1976) ("[N]othing in the legislative history shows any congressional purpose not to follow the Secretary's proposal [that honors the Tribe's request] . . .")

The Fourth Circuit understood that even if the 1959 Act does not expressly preserve the tribal claim, it is, at the very least, ambiguous. *See* Section IV C, *supra*. The Fourth Circuit properly examined and considered the surrounding circumstances, *i.e.*, that 1) the division of the Tribe's assets was conceived of and proposed by the federal government; 2) the Tribe was not represented by counsel; 3) the Tribe conditioned its consent on leaving this claim unaffected and was assured that the bill did not affect the claim; 4) the Interior Department, the Congressman and Congress itself purported only to be acting for the Tribe's benefit and in accord with tribal desires, and 5) the Act was enacted in accordance with a revised termination policy that emphasized tribal understanding and consent. Under these circumstances, it is difficult to conceive of a more appropriate case in which to apply this Court's directive that:

> statutes ratifying agreements with the Indians [are] not to be construed to their prejudice . . . . In *Choate v. Trapp, supra*, also a case involving a ratifying statute, the Court stated: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

*Antoine v. Washington,* 420 U.S. 194, 199-200 (1975) (citations omitted). Indeed, the Catawba Tribe referred to the bill they were approving only as "the Contract that was drawn up by the Bureau of Indian Affairs."[22]

Petitioners' suggestion that the Catawba Tribe intended only to preserve a state law claim, as opposed to their federal Nonintercourse Act claim (Petition at 21) is not credible in light of the Tribe's circumstances in 1959. Moreover, the Tribe's 1959 resolution sought to preserve "*any* claim" and the Tribe had twice petitioned the Department of the Interior based on the Nonintercourse Act. Finally, the suggestion that Congress intended to transform what had theretofore been a claim within "the exclusive province of the federal law," *Oneida Indian Nation, supra,* 414 U.S. at 667, into a state law claim is equally implausible.[23] Such an anomalous result could be expected to receive at least passing mention in the Act or its legislative history.

## CONCLUSION

Petitioners' projections of the consequences of permitting the Tribe access to the courts are overstated and are unwarranted in light of current congressional policy.

[22]Tribal minutes of March 28, 1959 meeting with Congressman Hemphill and Bureau of Indian Affairs. Appeals Record at 504.

[23]Petitioners' statement that the Tribe in the district court argued that Congress was aware only of a possible state law claim is flatly incorrect. That argument was first made by petitioners before the Fourth Circuit in their Petition for Rehearing at p. 8.



Denial of the Petition would mean only that the courthouse doors would be open to the Tribe, consistent with the federal government's assurance in 1959 that the Division of Assets Act would not be used to affect this claim. If the case proceeds to the merits, then Congress will no doubt settle this claim as it has the land claims of other Eastern tribes. Even in the absence of congressional action, a federal court would almost certainly fashion a remedy that would be just to all parties.

Because the ruling below turns on unique facts and unique statutory language, it will have little, if any, impact on the rights of other terminated tribes, most of whom have been restored to federal status. Finally, the Fourth Circuit's holding is fully consistent with opinions of this Court and other circuit courts. No court has ever construed a termination act to extinguish tribal property rights or implicitly terminate tribal rights left outside the scope of the act. This Court has held, however, that a termination act's general application of state law does not work to backhandedly extinguish treaty property rights and that a provision similar to the one on which petitioners rely is limited in its application to the withdrawal of federal supervision.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Don B. Miller
*Counsel of Record*

Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK, RAVENEL,
TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

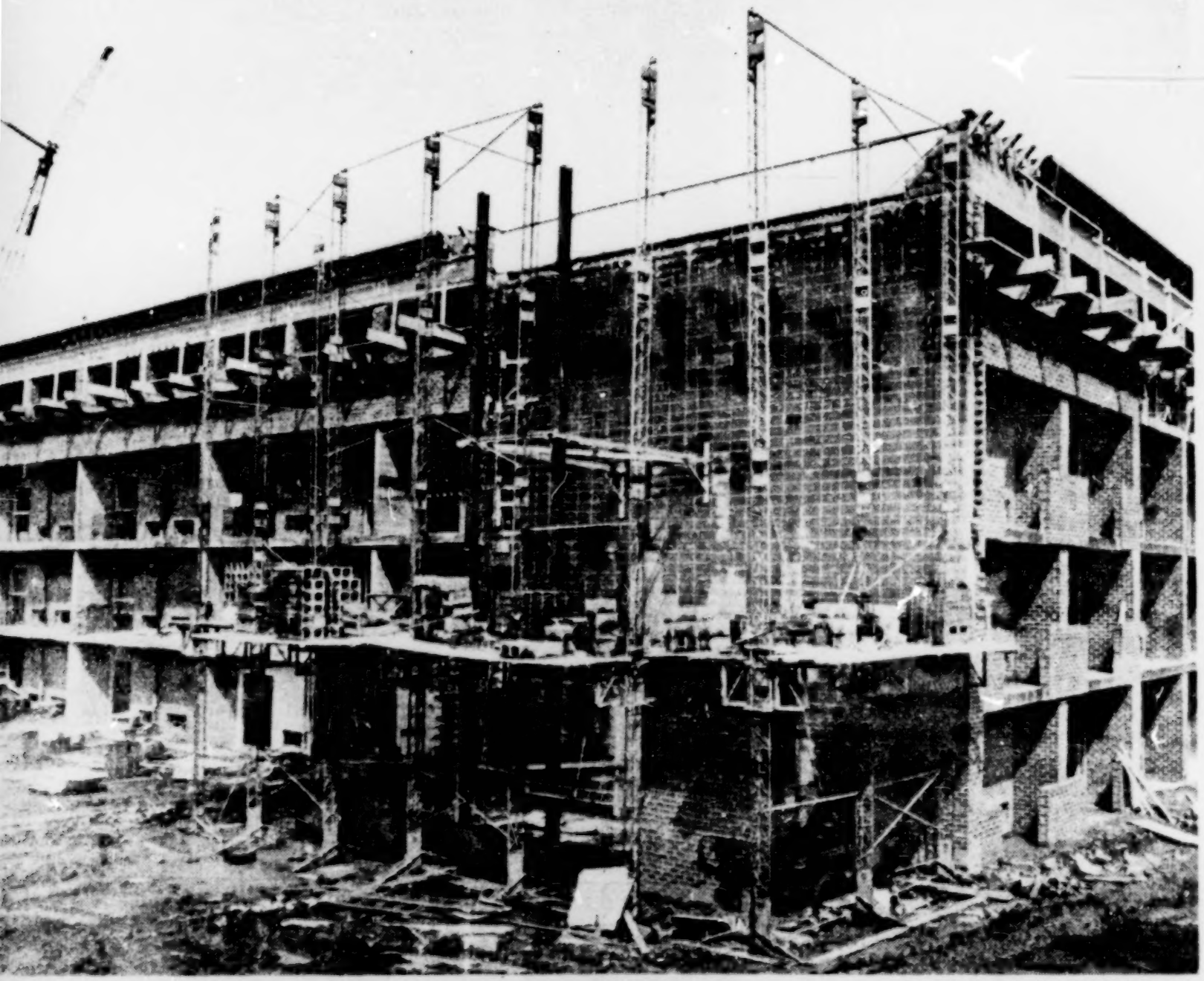
ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 327-1179

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471

# APPENDIX

s Office: 132 W. Main St., Rock Hill, S.C. Phone 32[illegible]4000 Tuesday, May 8, 1984 — Price 25¢

# PTL construction boosts county to record $30 million for month



Evening Herald photo by Andy Burriss

**CONSTRUCTION UNDER WAY ON PTL GRAND HOTEL**
**504-room building to be finished by August**

By DAVID HARRIS
Evening Herald staff writer

Work that began earlier this spring on the $24.48 million PTL Grand Hotel at Heritage USA boosted the March value of overall construction activity in York County to its highest monthly total ever.

The 504-room, 413,200-square-foot PTL project includes a four-story brick and block hotel building, three-story shopping mall called Main Street USA, and a business area with convention room.

Also under construction are a restaurant at the Victorian-style hotel and additional dining facilities in the business area.

The religious organization expects to complete the project in August. PTL already is booking conventions of Christian-related organizations, spokesman Brad Lacey said.

"We're 100 percent booked for the opening of the hotel," Lacey said.

The project inflated countywide construction totals to $30.18 million during March, easily surpassing the previous record monthly total of $16.7 millon in January 1982, when construction began on Piedmont Medical Center in Rock Hill.

Even excluding the PTL project, the total value of building permits issued in York County during March was 48 percent higher than that of permits issued in February. The gain over March '83 was 8.8 percent.

With the PTL project included, the value of building permits was a whopping 476 percent above the levels of a year ago, and 666 percent higher than permits issued during February.

Other major projects begun in March in unincorporated areas of the county included a $221,670 expansion of the Econo Lodge on Riverview Road, Rock Hill. A 20-room, two-story wing is being added to the motel, owned by Natu Patel.

See YORK, page 11

2a
EXHIBIT A
(Continued)

# York County building value sets record with PTL hotel

Continued from page 1

Construction in unincorporated areas also included 31 new homes valued at a collective $1.77 million and five duplex apartments worth $191,833.

Building activity was also on the upswing in some incorporated areas, particularly the city of Rock Hill, where the value of permits exceeded March '83 totals by 286 percent. The increase over the previous month was 141 percent.

Major projects in the city included the Medical Center office complex at 200 Herlong Ave. Atlanta developer Marshall Erdman and Associates is building the 26,000-square-foot building, which will house offices for nine doctors. The value listed on the building permit is $683,200.

Also, developer Bill Brewer is adding 19 units, valued at a total $230,400, to the Willowbrook Development off Willowbrook Avenue.

Permits were issued for 13 new homes in Rock Hill during the month.

Activity in York and Fort Mill was down from a year ago — a 20 percent drop in York and a 43 percent decrease in Fort Mill.

But building activity in both cities increased over the previous month's levels. The increase over the value of February permits was 30 percent in York and 142 percent in Fort Mill. All York permits were for renovations to existing building.

Construction was begun on five new homes in Fort Mill during the month, with four of those located on Jason Court, built by the Parkline Development Corp. of Rock Hill.

In Clover, new construction increased by 123 percent from March '83 and 146 percent from February.

New construction in Chester County increased by 37 percent from a year ago, and by 9 percent from the previous month.

Major projects included Heilig Meyers Furniture Co.'s $100,000 renovation of the old TG&Y building at Cestrian Square.

Permits were issued during the month for five new homes and four apartments in Chester County, which issues permits for incorporated and unincorporated areas.

EXHIBIT B

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Honorable James W. Moorman
Acting Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Moorman:

This letter constitutes a request for your Department to institute legal action on behalf of the Catawba Indian Tribe to recover its reservation in South Carolina. The issue in this litigation is whether South Carolina's attempt to acquire title to the Catawba reservation by virtue of an 1840 Treaty was valid under the Non-Intercourse Act, 25 U.S.C. § 177. We conclude that the Tribe can establish a prima facie case under the Non-Intercourse Act, that the 1840 Treaty was void, and that the Tribe is therefore entitled to recovery of its reservation.

The Catawba claim is for approximately 140,000 acres (or 15 miles square) to which they have had a vested property right since 1763. Prior to that date, the Tribe occupied and controlled a much larger area by aboriginal title. However, in 1763, the Tribe relinquished their claim to the larger area in return for Great Britain's assurance that they would have unmolested possession of the 15 mile square reservation. When the United States succeeded to Great Britain's sovereignty in 1783, our new government did not abrogate the 1763 Catawba Treaty. Therefore,



according to settled rules of international law, which are acknowledged by the U.S. Supreme Court, the Catawba retained a vested right in their reservation, as sacred as the fee simple of a non-Indian, which the United States Government was bound to respect. See *Mitchel v. United States,* 9 Pet. (34 U.S.) 711, 733 (1835).

The successive Non-Intercourse Acts, enacted to protect Indian property by requiring federal consent to the attempted conveyance of any Indian lands, were as applicable to the Catawba reservation as to any other kind of tribally held land. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (C.A. 1 1975). By 1840, the Catawba's treaty reservation was overrun by non-Indians who continually ignored the Tribe's protests; non-Indians also occupied the reservation lands under a state instituted leasing system whereby the lessees owed rent to the Catawba but often did not pay it. In 1840, the Tribe finally purported to convey their remaining title and interest in the 140,000 acres to the State of South Carolina by treaty. The federal government was in no way involved in the negotiations and never subsequently gave its consent. The 1840 conveyance was therefore void under the Non-Intercourse Act. Shortly after the 1840 Treaty, the Tribe sought return of the reservation stating the Treaty was procured by duress, that the terms were unfair and that the State wasn't meeting its obligations under the Treaty. Under the Non-Intercourse Act, the United States, as protector of Indian held lands, had the duty to protect the Catawba reservation, to set aside the 1840 Treaty if it didn't consent to it, and to assist the Catawba in recovering their lands. *Passamaquoddy, supra.*

The United States has never taken any action to fulfill its duty to help the Catawba recover the land. In fact, the Department of the Interior has twice refused, in 1906 and 1908, to take action when the Tribe's lawyers pointed out the Tribe's claims under the Non-Intercourse Act. But mere lapse of time and failure of the federal government to act cannot eradicate either the Catawba's rights to their land or the federal government's continuing duty to help them get it back. The Act of September 21, 1959, which terminated federal services to the Catawba and the applicability of federal Indian statutes similarly did not extinguish the 1840 Treaty claim or the government's duty of protection. The termination language in that 1959 statute is *prospective* and does not affect pre-existing legal rights. Moreover, the Supreme Court in *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968), and in many other Indian land cases, required clear evidence of Congressional intent before finding an abrogation of Indian rights. The legislative history of the 1959 Act shows that Congress, as well as the administering agency, believed the Act was passed for one reason—to liquidate a 3400 acre reservation and to terminate limited federal benefits both of which were created by a 1943 agreement between the Tribe, the State of South Carolina, and the Department of the Interior. In short, the 1959 Act was a means of dissolving the legal relationship set up by that 1943 agreement. In fact, Congress was unaware of the status of the 1763 treaty reservation, of the Non-Intercourse claim pertaining to it, and finally of its own duty under the Non-Intercourse Act to protect the reservation. The Tribe itself certainly did not contemplate the 1959 Act as a means of cutting off their legal claims to the 1763 reservation because they



stipulated, in the petition which gave rise to the 1959 legislation, that those claims should not be affected.

The action we hereby recommend is that the United States finally act upon its long neglected duty under the Non-Intercourse Act to nullify the 1840 Treaty with South Carolina and restore possession of the 1763 Treaty reservation to the Catawba Tribe.

An alternative source of the United States' duty to bring this suit to quiet title to the 1763 reservation arises from the 1959 Act itself. Since 25 U.S.C. § 935 did not abrogate the Catawba's Non-Intercourse Act claim, the 1763 reservation might be a tribal asset subject to the distribution provisions of 25 U.S.C. § 933, as was the known 3400 acre reservation. It would therefore be incumbent upon the Secretary, under § 933, to bring legal action to settle ownership of the 15 mile square reservation so that he could later determine whether that reservation should be conveyed to tribal members under § 933(d) or sold pursuant to § 933(f).

We recommend that the appropriate cause of action be a suit for ejectment of the current possessors of the tract and mesne profits for the period of time the Tribe has been dispossessed. This is the third time the Catawba Tribe has petitioned the Department to seek relief on their behalf and they have been twice refused for legally incorrect reasons. The attached materials include legal research by our staff attorneys and historical materials that should aid in your preparation of the case.

We recommend that you meet with us as soon as possible, and with the Tribe's representatives, to discuss the handling of the claim. The Tribe has already held several

meetings with the South Carolina Governor and Attorney General to discuss settlement of the claim. We understand that discussions have reflected a mutual intent to resolve the matter in a way that would satisfy the parties without endangering the State's economy or interfering with the orderly development of residential and industrial real estate. Since we agree with that approach, we should inform all concerned parties that we concur in the validity of the Catawba claim, that we would prefer an amicable, orderly settlement to lengthy, disruptive litigation, and that we will lend immediate assistance in negotiations for a just and model settlement.

Sincerely,

Solicitor

Attachments

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EXHIBIT C

§ 10(b) of the Act of August 18, 1958
72 Stat. 621

(b) After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

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EXHIBIT D

25 U.S.C. § 980

When the distribution of tribal assets in accordance with the provisions of sections 971-980 of this title has been completed, the Secretary of the Interior shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such tribe and its members has terminated. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians or Indian tribes because of their Indian status, all statutes of the United States that affect Indians or Indian tribes because of their Indian status shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in section 971-980 of this title, however, shall affect the status of any Indian as a citizen of the United States. Pub.L. 87-629, § 10, Sept. 5, 1962, 76 Stat. 431.

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EXHIBIT E

25 U.S.C. § 935

The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States

shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in sections 931-938 of this title, however, shall affect the status of such persons as citizens of the United States. Pub.L. 86-322, § 5, Sept. 21, 1959, 73 Stat. 593.

No. 84-782

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY TO BRIEF IN OPPOSITION

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

J. D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, SC 29602
(803) 242-6440
*Attorneys for C. H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, SC 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

JAMES D. ST. CLAIR, P.C.*
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
State of South Carolina
Rembert Dennis Building
Columbia, SC 29211
(803) 758-3970
*Attorneys for the State of South Carolina*

* Counsel of Record for Each Petitioner

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No. 84-782

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STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## REPLY TO BRIEF IN OPPOSITION

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### INTRODUCTION

Petitioners seek review of a four-to-three majority decision of the Fourth Circuit Court of Appeals reversing dismissal of the case and placing in jeopardy the homes, businesses, farms and churches of over 27,000 people. Respondent urges this Court to deny review, even though the decision has far-reaching consequences and raises issues that have sharply and equally divided the eight federal judges who have considered them (the district court judge and seven judges of the court of appeals).

#### A. If This Court Denies Review, Thousands Of Innocent Persons Will Suffer Harm.

In an effort to minimize the importance of the decision below, respondent asserts that the current landowners will be unharmed by the majority decision prolonging this litigation, because, respondent predicts, Congress eventually will pass settlement legislation to aid the landowners.[1] By this argument, respondent concedes that the

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[1] Respondent's Brief in Opposition at 9-11 [hereinafter cited as "Brief in Opposition"].

ultimate relief that it seeks has potentially disastrous consequences for thousands of innocent landowners. It is because the relief sought by respondent is so staggering that the Catawbas expect to force a settlement from the federal government. In essence, the Catawbas ask this Court to aid them in extracting a payment from Congress by denying review concerning the threshold legal issue of whether they now are entitled even to assert this claim.

Furthermore, respondent's unsupported assumption that Congress will rescue the landowners by agreeing to pay millions of dollars[2] for settlement legislation ignores political reality. The Rhode Island and Maine settlement acts cited by respondent[3] were enacted during the previous administration. The current administration has been far less inclined to provide even modest federal payments to settle Indian claims against non-federal defendants.[4]

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[2] The land at issue is highly developed and has been estimated to be worth more than a billion dollars. H.R. 3274, 96th Cong., 1st Sess. (1979). In 1979 the Catawbas sought 30 million dollars from Congress to resolve their claim. Hearings on H.R. 3274 Before the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 30 (1979).

[3] *See* Brief in Opposition at 10, n.5.

[4] For example, the Connecticut settlement legislation cited by the Catawbas as an example of a federal rescue was originally vetoed by President Reagan, who, in his veto message, declared that it is the administration's policy to pay no more than half of any settlement of Indian land claim litigation against a state and private parties. President's Message to the Senate Returning S.366 Without Approval, Cong. Rec. S4154-55 (1983). The Connecticut settlement legislation was subsequently amended and approved after the State of Connecticut agreed to contribute additional land and special services. The federal contribution amounted to less than one million dollars. Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760 (1982).

Indeed, the federal government did not contribute a single penny to the settlement fund in the one other Indian land claim settled during this administration. *See* Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. §§ 1741-1749 (1982). The State of Florida funded this settlement with the Miccosukee Tribe.

Consistent with the administration's position that the federal government will not be coerced into funding settlements of disputes between Indians and private citizens or the states, President Reagan has strongly cautioned litigants in Indian claims against relying on the federal government to fund a resolution of their disputes:

> I cannot . . . pledge the Federal Treasury as a panacea for this problem.

President's Message to the House of Representatives Returning H.R. 5118 Without Approval, 18 Weekly Comp. Pres. Doc. 732-33 (June 1, 1982).

[5] The Catawbas' reference to a newspaper article concerning a single construction project in Rock Hill, which presumably was planned and funded years before the Fourth Circuit majority's decision, hardly demonstrates that the defendants will emerge from this litigation without costs or that they are currently unaffected by the litigation. Various businesses in the claim area have had financial difficulties relating to the litigation, and there has been sufficient concern among homeowners in the area that an association was formed to contribute to the costs of defending their homes.

[6] Brief in Opposition at 12-15.



Thus, contrary to respondent's assertion, the landowners cannot assume that the federal government will fund a settlement of the claim, now or ever. Moreover, even if Congress were inclined to pass settlement legislation, it would be more likely to do so after a definitive resolution of the threshold issues presented here than while the viability of the claim is unclear. Most importantly, even if a settlement is ultimately achieved, the innocent landowners in this case could never be compensated for the hardships and uncertainties which result from the mere pendency of the litigation.[5]

### B. The Catawba Termination Act Makes State Law, Including The State Statute Of Limitations, Apply Both To Individual Catawbas And To The Tribe.

Respondent argues that the Catawba termination act contains unique statutory language, making state law applicable only to individual Catawbas and not to the tribe.[6] Respondent's argument is based upon faulty analysis of the language and context of the Catawba termination act. The Catawba termination act specifically provides:

> [*T*]*he tribe and its members* shall not be entitled to any of the special services . . . because of their status

> as Indians, [federal Indian statutes] shall be inapplicable to them, and *the laws of the several States shall apply to them* in the same manner they apply to other citizens or persons within their jurisdiction.[7]

The statute can *only* be construed in a grammatically correct way as making state law apply to "*them*"—"*the tribe and its members*,"—which is the subject of the sentence.

A comparative analysis of the language of other termination acts confirms that the Catawba act, like other such acts passed before and after it, makes state law applicable to the Indians both individually and collectively. Eight termination statutes provide in exactly the same words:

> [A]nd the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.[8]

In each of these statutes this language stands as an independent sentence with "tribe and its members" as the subject. In the Catawba termination act, the same provision appears as part of a compound sentence. The *only* difference between these eight statutes and the Catawba act is that the pronoun "them" has replaced the words "the tribe and its members." But the antecedent of the pronoun is "the tribe and its members."[9] Thus, once the pronoun is replaced by its antecedent, the act is identical to these eight termination acts, and all nine acts make state law apply to "the tribe and its members" in the same manner as to "other citizens or persons."

The Ponca termination act, which was passed after the Catawba act, is identical to the Catawba act in this re-

[7] Catawba, 25 U.S.C. § 935 (1982) (emphasis supplied).

[8] Klamath, 25 U.S.C. § 564q (1982); Western Oregon, 25 U.S.C. § 703 (1982); Alabama-Coushatta, 25 U.S.C. § 726 (1982); Paiute, 25 U.S.C. § 757(a) (1982); Wyandotte, 25 U.S.C. § 803 (1982); Peoria, 25 U.S.C. § 823 (1982); Ottawa, 25 U.S.C. § 848 (1982); Menominee, 25 U.S.C. § 899 (1982).

[9] Catawba, 25 U.S.C. § 935 (1982).



spect. It provides that state law shall apply to "them," using "them" to refer to the "tribe and its members."[10] Thus, each of these ten termination statutes, including the Catawba act, clearly makes state law apply to the affected Indians, both as individuals and as a tribe.

Where Congress intended in a termination act to draw a distinction between individual Indians and their tribe, it did so with specificity. In the Mixed-Blood Ute termination statute, where individual Indians were terminated but a federally-protected tribe continued, the provision concerning state law clearly distinguished between an individual terminated Indian and the unterminated tribe by providing that state laws should apply "to *such member* in the same manner as they apply to other citizens within their jurisdiction."[11] The distinction between an individual Indian and an Indian tribe is indicated by reference to "such member" of the tribe.

Surely, if Congress had intended by the Catawba act to create a distinction between individual Indians and the tribe under state law, it would have used distinguishing language in the act. But it did not. Instead Congress used the same language that it used in nine other termination acts which make state law apply to *both* individual Indians and the tribes.

At a minimum, if the significant distinction urged by respondent were intended, it would appear in the legisla-

[10] Ponca, 25 U.S.C. § 980 (1982). The Catawbas erroneously assert that it is the California Rancheria Act that is identical to the Catawba act, rather than the Ponca Act. Brief in Opposition at 15, n.14. But the Rancheria Act uses the pronoun "them" to refer to a different antecedent than in the Catawba and Ponca acts. The Rancheria act provides that state law shall apply to "them," referring to "the Indians who receive any part of such assets, and the dependent members of their immediate families." The Catawba and Ponca termination acts provide that state law shall apply to "them," referring to "the tribe and its members." Catawba Act, 25 U.S.C. § 935 (1982); Ponca Act, 25 U.S.C. § 980 (1982); California Rancheria Act, Pub. L. No. 85-671 (1958). Exhibits E, D and C in the Appendix, Brief in Opposition.

[11] Mixed-Blood Ute, 25 U.S.C. § 677v (1982) (emphasis supplied).

tive history. To the contrary, legislative history demonstrates that the Catawba act was typical termination legislation intended to end entirely any special federal status for the Indians, either as individuals or as a tribe. Congressman Hemphill, the sponsor of the bill, told the House Subcommittee on Indian Affairs that the bill was "the usual termination bill, with the usual provisions with which you are intimately familiar." [12] He and other congressmen, administrative officials, and the Catawbas themselves consistently referred to the proposal as "termination." [13]

The only collective action which Congress contemplated that the Catawbas could undertake after termination was as a non-profit organization subject to state law. Congressman Hemphill, Subcommittee Chairman Haley and the Associate Commissioner for the Bureau of Indian Affairs, all declared that the Indians could form a non-profit corporation under state law if they wished to continue

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[12] Hearings on H.R. 6128 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 86th Cong., 1st Sess. 12 (1959). The Subcommittee held two public hearings on the bill on July 10 and July 27, 1959. It held an Executive session on August 7, 1959. The full Committee met on the bill on August 12, 1959. Each of these transcripts will be referred to by date.

[13] *E.g.*, Transcript, July 10, 1959 at 20 (remarks of Mr. Edmonson indicating that he considered the proposed legislation to be similar to the Wyandotte and Peoria termination acts); Transcript, July 10, 1959 at 46 (remarks of Catawba Samuel Beck in opposition to the legislation precisely because he understood that the tribe would be affected: "I feel if termination is made then our tribe will be non-existent from here on out and we will not have a reservation."); Transcript, July 10, 1959 at 90 (remarks of Subcomm. Chairman Haley calling the envisioned result of the bill "termination"); Transcript, July 27, 1959 at 85-6 (remarks of H. Rex Lee, Associate Commissioner of the BIA, referring to the proposal as "termination"); Transcript, August 12, 1959 at 10, 15 (remarks of Lewis A. Sigler, Legislative Counsel, Office of the Solicitor of DOI, describing the proposal as a "termination process" and comparing the Catawba act to other termination acts without mention of any purported distinction between individual Catawbas and the tribe).



some form of group activities.[14] The Solicitor's Office of the Department of the Interior also explained to the Catawbas prior to their final vote to accept termination:

> Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes," so the individual members will no longer be subject to laws which apply only to Indians. *Nothing in the act prohibits those interested in organizing under State law* to carry on any of the nongovernmental activities of the group.[15]

Thus, both the language and the legislative history of the Catawba act demonstrate that the act makes state law applicable to the tribe, as well as to individual Catawbas. Even as a group, they were subjected to all the effects of termination and were, therefore, obligated to bring any claim they had before the expiration of the state statute of limitations.

### C. Proper Construction Of The Catawba Act Depends Upon What Congress Intended And Provided.

Respondent argues that the Fourth Circuit majority was somehow justified in ignoring the plain language of the Catawba termination act because the Catawbas passed a tribal resolution requesting that legislation be drafted but that an undefined claim against the State of South

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[14] Transcript, July 10, 1959 at 30, 53-4; Transcript, July 27, 1959 at 90. Indeed, the Catawbas took that advice. The respondent styles itself as a non-profit organization chartered under South Carolina law.

[15] App. Rec. at 531 (Petitioners' Ex. 29 at 5) (emphasis supplied). The respondent contends that the Catawbas can still function as a federal tribe, with special privileges and immunities. But the tribal constitution was revoked, and the Bureau of Indian Affairs does not recognize the Catawbas as a tribe for any purpose under federal law. App. Rec. at 551 (Petitioner's Ex. 39).

Carolina be unaffected by the requested legislation.[16] Respondent further suggests that the Catawbas' "understanding" of the legislation, as reflected in a resolution passed before the legislation was drafted, supersedes the plain language of the statute. In support of this contention, respondent principally relies upon a section of the Catawba termination act which provides for a referendum, allowing the Indians to vote on whether to accept termination.[17] What respondent ignores is that the Catawbas voted in this referendum to accept the legislation as enacted, after receiving a full and complete explanation of the act.[18] As enacted, explained to and accepted by the Catawbas, the act failed to preserve any claim from the effects of termination.[19] As with any other statute, the Catawba termination act must be construed as it was written, intended and enacted by Congress.[20]

[16] Brief in Opposition at 5, 12. The tribal resolution explicitly characterized the claim as a claim against the State of South Carolina but failed to give any further description of the nature of the claim. Even if the resolution could somehow determine the meaning of the statute, no claim against private landowners was sought to be preserved. If any claim was saved from the effects of termination it could only have been a claim against the state.

The respondent is inaccurate when it asserts (Brief in Opposition at 24, n.23) that it did not initially argue that only a claim against the state was discussed at the time of the Catawba termination act. At pages 50-51 of the Catawbas' initial brief in the district court opposing dismissal, they asserted that Congress was aware only of a claim against the state at the time of the Catawba termination act. Plaintiff's Response to Defendants' Motion to Dismiss at 50-51.

[17] Brief in Opposition at 16-17.

[18] App. Rec. at 531 (Petitioners' Ex. 29 at 5). *See supra* note 15 and accompanying text.

[19] In several other termination acts, Congress specified that certain claims against the United States would be unaffected by termination. Mixed-Blood Ute, 25 U.S.C. § 677r (1982); Western Oregon, 25 U.S.C. § 706 (1982); Ponca, 25 U.S.C. § 976 (1982).

[20] *E.g., see* Rice v. Rehner, —— U.S. ——, 103 S.Ct. 3291, 3302 (1983); BankAmerica Corp. v. United States, —— U.S. ——, 103 S.Ct. 2266, 2270 (1983); United States v. Hoodie, 588 F.2d 292. 295 (9th Cir. 1978).

The California Rancheria Act also provided that the Indians on various rancherias could vote whether to accept termination; but the circumstances and conditions of their termination were governed by what Congress provided in the statute. When the Rancheria act was later construed in *Table Bluff Band* v. *Andrus*, 532 F. Supp. 255, 264 (N.D. Cal. 1981), the district court declared, "A termination act does not create a contract between the government and the Indians . . . ."



**D. Application Of The State Statute Of Limitations To This Claim Would Not Be Unfair.**

Respondent argues that it would be unfairly deprived of its "day in court" [21] if the Court reviewed the majority decision and decided that the claim could no longer be asserted in 1980, 140 years after it accrued. Respondent asserts, without explanation, that it has "never before had the opportunity to present its claim for judicial resolution." [22]

To the contrary, the Catawbas admit that they had extensive opportunity to bring whatever claim they had. As long ago as 1905 they were represented by counsel who was aware of a potential claim under the Nonintercourse Act,[23] and they tried to prompt the federal government to act on a claim relating to the 1840 treaty several times over the last 80 years.[24] Moreover, respondent's counsel contended in the recently argued *Oneida* case, that the right to pursue a Nonintercourse Act claim in federal court has existed since 1790, when the first Nonintercourse Act was enacted.[25] Yet the Catawbas failed to bring this claim for 125 years before the Catawba termination act became effective and then for another 18 years

[21] Brief in Opposition at 7-8.

[22] *Id.* at 8.

[23] Brief in Opposition at 1, n.1.

[24] Brief in Opposition at 1, 10, n.8.

[25] Brief in Opposition to Petition for Certiorari at 10, County of Oneida, N.Y. v. Oneida Indians (*"Oneida"*), 719 F.2d 525 (2d Cir. 1983), *cert. granted*, —— U.S. ——, 104 S.Ct. 1590 (1984) (No. 83-1065) (argued October 1, 1984).

after the act changed their legal status under federal law.[26]

## CONCLUSION

For all of the reasons stated above and in the petition for certiorari, this Court should grant the petition and review the divided decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, POYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

J. D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, SC 29602
(803) 242-6440
*Attorneys for C. H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, SC 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

JAMES D. ST. CLAIR, P.C.*
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
State of South Carolina
Rembert Dennis Building
Columbia, SC 29211
(803) 758-3970
*Attorneys for the State of South Carolina*

* Counsel of Record for Each Petitioner

January 4, 1985

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[26] The application of state law to the Catawbas did not eliminate their opportunity to bring their claim. Even after the Catawba termination act became effective, the Catawbas had ten years to assert the claim and test its viability before it was barred by the applicable state statute of limitations. But the Catawbas failed to do so.

(5)

No. 84-782

In The

# Supreme Court of the United States

October Term, 1984

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*Petitioners,*

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*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## RESPONDENT TRIBE'S SUPPLEMENTAL BRIEF

DON B. MILLER
*Counsel of Record*
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK, RAVENEL, TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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## INTRODUCTION

On May 8, 1985, the Solicitor General of the United States, at the Court's invitation, expressed the view that the Court should grant the Petition for a Writ of Certiorari. This brief is filed pursuant to the Court's Rule 22.6 in response to new issues raised by the United States.

## DISCUSSION

### I. Under The United States' View, Even If The Court Were To Grant The Petition And Reverse The Fourth Circuit's Ruling On Applicability Of State Statutes Of Limitations, The Tribe Would Still Possess Significant Land Claims.

Because South Carolina, alone among the state jurisdictions, does not permit tacking of successive periods of possession by adverse occupants in order to establish title pursuant to its 10-year statute of limitations, S.C. Code Ann. § 15-3-340 (Law Co-op. 1977), an 18-year delay under South Carolina law would not establish even a presumption of title. Indeed, the United States concedes that application of state statutes of limitations to the Tribe's claim might not immediately resolve the underlying controversy (Br. at 17, 20).

South Carolina law is clear. As the foremost commentator on South Carolina property law has observed:

> The rule in this state, contrary to the view of the overwhelming majority of jurisdictions, is that even though there may be privity by deed or devise between successive adverse occupants of the land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations.

D. Means, *Survey of Property Law*, 10 S.C.L.Q. 90 (Fall 1958). Professor Means' statement is supported by an

unbroken line of South Carolina Supreme Court decisions. *See Adams v. Adams,* 220 S.C. 131, 66 S.E.2d 809 (1951); *Haithcock v. Haithcock,* 123 S.C. 61, 115 S.E. 727, 729 (1928) ("A man cannot tack, in order to make ten years, . . . the ten years must be in himself alone, or by way of inheritance." Quoting with approval trial judge's jury charge); 7 R. Powell, *The Law of Real Property,* ¶ 1014[2] at 91-63 (1984).

In *Crotwell v. Whitney,* 229 S.C. 213, 92 S.E.2d 473, 477 (1956), the South Carolina Supreme Court stated plainly that the adverse occupant has the burden of establishing possession for the entire 10-year statutory period without tacking:

> Plaintiffs having established their legal title to the premises, appellant['s] . . . claim of title by adverse possession required proof of actual, open, notorious, hostile, continuous, and exclusive possession by him, or by one or more persons through whom he claimed, for the full statutory period of ten years, *without tacking of possession* except by descent cast. Code 1952, Sections 10-2421, 10-124 [now codified as §15-3-340]; . . . (citations omitted, emphasis added).

*See Gregg v. Moore,* 226 S.C. 366, 85 S.E.2d 279, 281 (1954) ("The burden of proof of adverse possession is on the party relying thereon . . ."). Thus, in order to defeat the Tribe's claim of title, each defendant would be required to prove open, hostile, notorious and continuous possession for a 10-year period.[1]

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[1]It is also certain that under South Carolina law, those defendants against whom the claim was not barred by the 10-year statute of limitations could not invoke the equitable defense of laches. "Laches within the period of the statute of limitations is no defense at law." Crotwell v. Whitney, *supra,* 92 S.E.2d at 478.



The United States attempts to sidestep the obvious implication of South Carolina's unique law. It characterizes the district court's finding that the anti-tacking rule has no relevance as an apparently reasonable interpretation of South Carolina's law (Br. at 18, n. 18). However, because the district court (a Pennsylvania judge sitting by designation) simply adopted the entirety of defendants' proposed findings of fact and conclusions of law *verbatim,* its interpretation of South Carolina law should be accorded little deference. *See United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 656-57 (1964). The consistent line of South Carolina Supreme Court decisions demonstrates that South Carolina's anti-tacking rule and the 10-year statute of limitations are inextricably linked: the 10-year limitations period contained in S.C. Code Ann. § 15-3-340 may be asserted only by an adverse possessor who has been in possession for at least 10 years. *Crotwell v. Whitney, supra;* Note, *Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grant, and Prescriptive Right in South Carolina,* 10 S.C.L.Q. 292, 298 (Winter 1958); *see* 7 R. Powell, *supra,* ¶ 1012[2] at 91-4 ("The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment by the record owner would be barred by the statute of limitations.").

Nonetheless, the United States urges the Court to hear the case because a reversal would "presumably . . . substantially settle much of the uncertainty . . . and would conclusively determine the title question as regards at least substantial portions of the land." (Br. at 19, 20).

Implicit in the Solicitor General's argument is the recognition that a reversal of the Fourth Circuit would not resolve the claim to substantial portions of the land, *i.e.*, the lands of "some owners of homes and other property in the claims area [who] have not personally been in possession for the 10 years necessary to obtain title by adverse possession." (Br. at 18).

Counsel for the Tribe estimates that if the South Carolina statute of limitations were to apply, the Tribe would retain its claims to up to 40% of the land in the claim area.[2] It is difficult to envision how public policy would be served by a decision resulting in continuing tribal claims against only those landowners who, by happenstance, had been in possession of their land for less than ten years when the case was filed in 1980. The United States' view of the 1959 Act would presumably bar

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[2]It is admittedly difficult to project with certainty the number of landowners within the claim area who had been in possession for 10 or more years when the suit was filed in 1980. The Rock Hill area has experienced substantial growth, however, in the period between 1960 and 1980. United States Census figures for Rock Hill and York County reveal the following:

| | 1960 pop. | 1970 pop. | % Change ('60-'70) | 1980 pop. | % Change ('70-'80) |
|---|---|---|---|---|---|
| York County | 78,760 | 85,216 | 8.2% | 106,720 | 25.2% |
| Rock Hill | 29,404 | 33,846 | 13.1% | 50,846 | 50.2% |

Source: U.S. Census, South Carolina General Population Characteristics, Table 13 (1960); Table 42-40 (1970); Tables 42-7 and 42-11 (1980). It is logical to infer, therefore, that a very substantial amount of real estate has changed hands in the claim area in the 18-year period between 1962 and 1980, especially considering that the vast majority of York County's growth, like all of Rock Hill's growth, has taken place within the claim area.



tribal claims against many of the larger, more established property owners, while leaving the brunt of the litigation to be borne by the more numerous smaller landowners. Moreover, each defendant in the claim area would have the burden of presenting his own proof of open, notorious, hostile and continuous possession in order to establish that the Tribe's claim to his parcel was barred; and the Tribe might well be forced to proceed separately against each individual landowner. Many, if not all, of the benefits of class action litigation would be lost.

Thus, the United States' objectives of settling uncertainty and finalizing the title question would not be served. Probably a majority of the 27,000 members of the putative defendant class do not occupy lands that have been in their possession for 10 of the 18 years preceding filing of the suit in 1980. Rather than moving the case toward an orderly and equitable resolution, adoption of the United States' view of the 1959 Act would result in chaos.

This is plainly a matter that should be resolved by Congress. If the petition is denied and the case proceeds to the merits, Congress will undoubtedly enact settlement legislation.

## II. The Fourth Circuit Correctly Construed The 1959 Act: The United States' Interpretation Would Result In An Implicit, Indirect Termination Of A Treaty Reservation.

For purposes of their motion to dismiss, which was based solely on the effects of the 1959 Act, defendants assumed that neither the Tribe's property interest nor its federally-protected status as an Indian Reservation

were validly disturbed until 1959. Thus, for purposes of this motion, the lands within the claim area constituted a federally-protected Indian Reservation in 1959—any attempted prior conveyance being void under the Non-Intercourse Act and federal common law. *County of Oneida v. Oneida Indian Nation,* No. 83-1065 (Mar. 4, 1985) (*Oneida* II). While the United States concludes that the 1959 Act did not extinguish the Tribe's property interest (Br. at 6-8), it argues that it nonetheless made state law applicable to the 1763 Treaty Reservation. If state law has been made applicable, and federal restrictions removed, then the land's status as an Indian Reservation has been terminated.

This Court has repeatedly held that Congressional termination of reservation status "must be expressed on the face of the act or be clear from the surrounding circumstances or legislative history. . ." *Mattz v. Arnett,* 412 U.S. 481, 504-5 (1973); *Solem v. Bartlett,* — U.S. —, 79 L.Ed.2d 443, 450 (1984). In this case, however, Congress made no specific mention of terminating the protected status of the 1763 Treaty Reservation. Congress did make plain, however, its specific intent to terminate the small reservation acquired administratively in 1945 (Br. in Opp. at 6). To conclude that Congress, without mention, also intended to terminate the 1763 Treaty Reservation, violates the principle that Congress must use explicit language to terminate an Indian Reservation.

Such a conclusion is likewise inconsistent with the United States' own recognition that the 1959 Act "should be construed in light of the tribal resolution . . . expressing the desire that 'nothing in this legislation shall affect the status of any claim against the State . . . by the . . .



Tribe' ", as well as the fact that the "Catawba Act was drafted to carry out the intent of the resolution." (Br. at 8, n. 7). On the one hand, the United States argues that the Fourth Circuit was correct in applying the canons of construction requiring plain and unambiguous Congressional intent to extinguish Indian title (Br. at 7), and that it was likewise correct in looking to the legislative history and surrounding circumstances to determine the title extinguishment and tribal existence issues (Br. at 8, n. 7, 8). But in its analysis of the application of state law issue, the United States does an about-face and argues that only the language of the Act itself should be considered—notwithstanding that Congress "quite likely" did not consider the effect of the Act on the Tribe's claim (Br. at 14), and that "Congress' focus in this case [was] on the 1943 Memorandum of Understanding." (Br. at 15).

The harsh result urged by the United States permits virtually an entire treaty reservation to simply fall through the cracks. But Congress does not deal with valuable Indian property rights in so cavalier a fashion, particularly where, as here, it purported only to be acting for the Tribe's benefit. If Congress had intended to permit the application of state statutes of limitations to the tribal claim, in abrogation of tribal desires and the assurances to the Tribe by the Bureau of Indian Affairs and the bill's sponsor (Br. in Opp. at 4-6), it would have surely provided explicit notice to the Tribe that it would have only a certain period of time in which to assert its claim. When Congress intends to apply statutes of limitations to old Indian claims, it does so expressly and takes great pains to ensure that the rights of tribes are pro-

tected. *See* 28 U.S.C. § 2415; *Oneida* II, slip op. 14-16. To construe the 1959 Act as urged by the United States, particularly when the United States, as trustee, assured the Tribe that the Act would not affect the claim, would be "at the least, a sorry breach of faith with these Indians." *Squire v. Capoeman,* 351 U.S. 1, 10 (1956).

---

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DON B. MILLER
*Counsel of Record*
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK, RAVENEL,
TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471

No. 84-782

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

JAMES D. ST. CLAIR, P.C.*
JAMES L. QUARLES III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

J. D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, S.C. 29602
(803) 242-6440
*Attorneys for C.H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, S.C. 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
STATE OF SOUTH CAROLINA
Rembert Dennis Building
Columbia, S.C. 29211
(803) 758-3970
*Attorneys for the State of South Carolina*

* Counsel of Record for Each Petitioner

May 24, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

# Supreme Court of the United States

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No. 84-782

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STATE OF SOUTH CAROLINA, *et al.*,
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

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### INTRODUCTION

On May 22, 1985 the Catawbas filed a Supplemental Brief replying to the Solicitor General's recommendation that this Court review and reverse the decision of the United States Court of Appeals for the Fourth Circuit in *Catawba Tribe of South Carolina, Inc. v. State of South Carolina*, 740 F.2d 305 (4th Cir. 1984) (*en banc*). This brief [1] is filed in response. No argument advanced by the

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[1] Because the Catawbas' supplemental brief was first received by any of the counsel for petitioners on May 23, 1985, and the petition has been scheduled for a conference on May 30, 1985, it has not been possible to prepare a printed version of this brief. Under an arrangement with the clerk, a copy of this brief for each Justice and three additional copies have been delivered to the clerk. A

Catawbas diminishes the compelling need for this Court to review now issues which have evenly split eight federal judges and which affect the rights of more than 27,000 innocent South Carolina landowners to unclouded possession of their homes and businesses.

## DISCUSSION

### I. This Court Should Now Determine Whether The Catawba Termination Act Made The South Carolina Statute Of Limitations Apply To This Claim.

The Solicitor General has concluded that the Court of Appeals majority was "clearly wrong" in concluding that the Catawba termination act, 25 U.S.C. §§ 931-938, did not make state law, including the South Carolina statute of limitations, applicable to this claim. *See* Amicus Brief of the United States at 16. The Catawbas have chosen not to address the merits of the United States' conclusion or the threshold question of whether the Catawba termination act made state law apply. Instead, they urge that the Court deny review on the grounds that: (1) a determination that state law applies might not finally resolve the Catawbas' claim; (2) it is somehow premature to determine the applicability of state law; and (3) if sufficient hardship is imposed upon innocent landowners by the pendency of this claim for as much as a decade, Congress will enact legislation bestowing largesse upon the Catawbas. Each assertion is demonstrably incorrect.

#### A. Application Of The South Carolina Statute Of Limitations Will Resolve The Catawbas' Claim Against All Landowners.

By arguing that the statute of limitations only bars the Catawbas' claim as to those persons who have occupied their property for the continuous ten-year period necessary to acquire title by adverse possession, the Catawbas confuse the statute of limitations with the doctrine of adverse possession. The South Carolina statute of limitations defeats an affirmative claim of title by barring the claimant's right to maintain an action, if it can be demonstrated that the claimant has not possessed the land at issue within ten years prior to the commencement of the action. *See* S.C. Code Ann. § 15-3-340;[2] *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923).[3] A defendant who defeats a plaintiff's claim of title by demonstrating that the plaintiff is barred by the statute of limitations has no further obligation to demonstrate that he has satisfied the requirements of adverse possession.[4]

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printed version will be prepared and submitted later in the week of May 27, 1985. [The printed version, hereby filed on May 30, 1985, is identical to the typewritten version except for this sentence in brackets.]

[2] S.C. Code Ann. § 15-3-340 provides:

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

By its own admission, the Catawbas were dispossessed of the land in issue approximately 140 years before suit was commenced.

[3] In *Haithcock* the Supreme Court of South Carolina has affirmed:

> [T]he law makes possession a very strong factor in the question of title to real estate, and it says if a man stays out of possession for 10 years, asserts no claim to a piece of property, does not occupy it by himself or by tenants, and lets that situation remain for 10 years the law says that it is too late for him to come in, that he is barred by the statute of limitations, and having slept on his rights for as long as 10 years he cannot come in afterwards and assert his rights.

115 S.E. at 729.

[4] The Catawbas' reliance upon *Adams v. Adams*, 220 S.C. 131, 66 S.E.2d 809 (1951) and other discussions of tacking is, accordingly, misplaced. *Adams* addressed only the issue of whether the defendant had acquired title by adverse possession. The Catawbas' concession that they have not possessed the land at issue for more than 140 years, together with the fact that the landowners cur-

This case was not commenced by 27,000 South Carolina landowners to affirmatively establish title to their land. Instead, it is the Catawbas who have challenged the validity of a voluntary 1840 transaction. Consequently, the ability of each landowner to establish title under adverse possession or other doctrines is irrelevant. The Catawbas' conceded failure to act on their claim while out of possession for more than ten years since the statute of limitations began to run now bars the Catawbas' claim as to any landowner.

### B. Even If Some Portion Of The Catawbas' Claim Could Survive The Application Of South Carolina Law, No Reason Exists To Delay Removing The Cloud From The Title Of Thousands Of Innocent Landowners.

Counsel for the Catawbas "estimates" that if their construction of the South Carolina statute of limitations were adopted, the Catawbas "would retain [their] claims to up to 40% of the land in the claim area." Supplemental Brief at 4. The Catawbas' concession that even their improperly restrictive interpretation of South Carolina law would lift the cloud from 135 square miles of property held by more than 15,000 property owners is a compelling argument *in favor* of the grant of certiorari.

Professing their concern that "adoption of the United States' view would result in chaos," that the respondent "might well be forced to proceed separately against each individual landowner," and that "[m]any, if not all, of the benefits of class action litigation would be lost," the Catawbas ask that the Court decline to review a question of law on which eight judges have sharply, and equally, divided. *See* Supplemental Brief at 5. There are at least two sufficient answers to the Catawbas' arguments.

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rently have record title to their property, eliminates any need for the landowners to rely upon adverse possession to obtain title to their property.



First, if, as the United States and the petitioners contend, the Catawba termination act operates to bar the Catawbas' claim against all, or any, of the current landowners, the factual determinations of which the Catawbas now complain must be made eventually. It is senseless to subject all, or any, of those landowners to years of litigation and uncertainty before they receive the relief to which they are now entitled.

Second, the Catawbas can scarcely claim that their failure timely to assert their rights is a sufficient reason to burden thousands of landowners with expensive litigation. If there is any necessity to determine rights on an individual basis and that produces "chaos" for the Catawbas or impedes their ability to employ the "benefits of class action litigation," it is the Catawbas who must bear the burden of their failure to act timely. They cannot be permitted to shift that burden to innocent landowners against whom they have no right to proceed.

### C. The Catawbas' Speculation That Congress Will Enact Settlement Legislation If They Are Permitted To Continue To Impose The Hardship Of This Litigation Upon The Citizens Of South Carolina Is Both Inappropriate And Unfounded.

The Catawbas have confirmed that their underlying purpose is to use this litigation to extract a remunerative settlement from Congress:

> If the petition is denied and the case proceeds to the merits, Congress will undoubtedly enact settlement litigation.

Supplemental Brief at 5. That argument is no more than a request that this Court delay the resolution of a substantial issue of federal law—which the Court of Appeals' resolved in a manner the United States has concluded is "clearly wrong"—so that the burden of the uncertainty and expense of litigation can be used to leverage a settle-

ment from Congress. But this Court's adoption of Fed. R. Civ. P. 11 and its recent amendments declared that the expense and burden of unfounded litigation may not properly be used to force a settlement. The merits of a case, not the burden of defending it, are the only proper basis for its settlement.

Equally important, however, is the fact that there is no basis whatever for the Catawbas' speculation that Congress will somehow rescue the landowners and bestow its largesse upon the Catawbas. Congress has shown no inclination to enact legislation to resolve claims such as those asserted by the Catawbas, and in those instances in which it has enacted legislation for other groups this Administration has vetoed the legislation. In light of the United States' determination that the Court of Appeals construction of the 1959 legislation was "clearly wrong," the likelihood of any successful legislative resolution is perhaps lower for the Catawbas than for any other group.

As the Solicitor General recognized, Congress acted in 1959. Amicus Brief at 20. A Congress which has acted, and an Administration which views the Congress as having acted is scarcely a prescription for further legislative action. Even if the Catawbas are able to visit substantial burdens upon the innocent landowners, or, as they would have it "proceed on the merits," they are unlikely to be able to achieve their goal of extracting "settlement legislation" from Congress.

### II. The United States' Construction Of The Catawba Termination Act Is Unassailably Correct.

The Catawbas assert that the United States improperly has construed the unambiguous language of Sections 5 and 6 of the Catawba termination act because, in the Catawbas' view, the statutory language is insufficiently clear to terminate a reservation, and because the United States' construction of that statute would produce a result



inconsistent with the Catawbas' supposed wishes. Neither argument withstands analysis.

First, the Catawbas' reliance upon cases involving the termination or diminishment of a reservation is misplaced. *See* Supplemental Brief at 6. In 1959, no Catawba "reservation" existed and no area of land which could be fairly characterized as a "reservation" had existed for more than 120 years. At most, the Catawbas possessed a claim, subject to all available legal and equitable defenses,[5] to the return of land they had neither occupied nor possessed for more than 120 years. Moreover, as to the only land which could plausibly be described as a "reservation" in 1959—the land acquired administratively pursuant to the 1943 Memorandum of Understanding—the Catawbas candidly concede that "Congress did make plain its specific intent to terminate [it]." *See* Supplemental Brief at 6.[6]

Second, there is no inconsistency between the Catawbas' asserted desire that any claim they might have against the State of South Carolina not be affected by the Catawba termination act and the interpretation of that act provided by the Solicitor General. Even assuming that the Catawbas articulated a desire to preserve something other than a breach of contract claim against the state of South Carolina, it is clear that the Catawbas also desired to be fully subject to state law. The United States now only suggests that both these desires were honored

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[5] *County of Oneida v. Oneida Indian Nation*, No. 83-1065 (March 4, 1985).

[6] Indeed, it is the Catawbas' construction which produces absurd results. Their concession that Congress evidenced its intent to terminate the "smaller reservation" attributes to Congress an intent to terminate 3,400 acres from the center of the claim area, while at the same time preserving a claim to 225 square miles inhabited for more than one hundred years by tens of thousands of South Carolina citizens upon which, for example, sits the United States District Courthouse in which this action was pending.

No. 84-782

IN THE
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*Petitioners,*
v.
CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## JOINT APPENDIX

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

J. D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, SC 29602
(803) 242-6440
*Attorneys for C. H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, SC 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

JAMES D. ST. CLAIR *
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
State of South Carolina
Rembert Dennis Building
Columbia, SC 29211
(803) 758-3970
*Attorneys for the State of South Carolina*

* Counsel Of Record For Each Petitioner

September 3, 1985

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1984
CERTIORARI GRANTED JUNE 3, 1985

153 pp

DON B. MILLER *
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK,
RAVENEL, TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471

* Counsel Of Record
For Respondent

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Note: All items have been printed exactly as they appear in the original. Misspellings and inconsistencies have not been corrected.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Civil Action No. 80-2050

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA NATION OF SOUTH CAROLINA,
*Plaintiffs*

v.

STATE OF SOUTH CAROLINA, *et al.*,
*Defendants*

**RELEVANT DOCKET ENTRIES**

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 10-28-80 | 1 | SUMMONS AND COMPLAINT AND JS44 76 cc to USM for svc. 10-29-80 w/cpy of motion |
| 10-28-80 | 2 | MOTION (REF ————) by pltf. to certify class action |
| 10-28-80 | 3 | MEMORANDUM (RECEIVED) by pltf. in support of motion to certify class action |
| 11-4-80 | — | USM RETURN of svc of S&C and Motion on State of S.C., Richard Riley as Governor, Cola., S.C., 10-31-80 |
| 11-7-80 | — | USM ENDEAVOR (10) of endeavor to svc S&C on defts., Francis Lay Springs, Lancaster, 11-7-80; on W.J. Harris, Harris, Rock Hill, 11-7; John Marshall Walker, II, Rock Hill; Arnold F. Marshall, Rock Hill; Wilson Barron, Rock Hill; Robert F. Simpson, Rock Hill; F.M. Mack, Fort Mill; J.R. McAlhaney, Fort Mill; John W. Ardrey, Fort Mill; E.N. Martin, Prospect, Ky, ALL RTN UNEX 11-7-80 |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 11-7-80 | — | USM RETURNS (62) of svc of S&C on defts., J. Max Henson, Elizabeth Ardrey Grimball, W.B. Ardrey, Jr., Springs Mills, Ardrey Farms, Tega Cay Associates, Hugh M. White, Jr., W.A. McCorckle, Mary McCorckle, Fort Mill, S.C., 11-5-80; William O. Nisbit, Robert M. Yoder, 11-5-80, Lancaster, S.C., County of Lancaster, William Elliot Close, Patricia Close, Leroy Springs Close, Francis Allison Close, Hugh William Close, Jr., James Bradley, Hugh William Close, Lillian Crandall Close, 11-6-80, Lancaster, S.C.; Church Heritage Village & Missionary Fellowship; Wachovia Bank and Trust Co., John M. Belk, W.O. Nisbett, III, Mary Nisbet Purvis, J.P. Stevens & Co., Jane Nisbett Goode, Nisbet Farms, Inc., R.N. Rencher, Thomas Brown Snodgrass, Jr., Crescent Land & Timber, Corp., Duke Power Co., 11-3-80 Charlotte, N.C.; Euginia Nisbet White, Archie B. Carroll, Jr., 11-4-80, Charlotte, N.C.; Will R. Simpson, Citizens and Southern National Bank of S.C., T.W. Hutchinson, Hiram Hutchinson, Jr., J.E. Marshall, Jr., Ned M. Albright, Marshall E. Walker, C.D. Reid, Jr., Robert A. Fewell, J.W. Anderson, Jr., David Goode Anderson, Jesse G. Anderson, John Wesley Anderson, City of Rock Hill, Roddey Estates, Inc., Herald Publishing Co., Rock Hill, S.C., 11-4-80; Flint Realty and Construction Co., W. Watson Barron, Southern Railway Co., F.S. Barnes, Jr., Home Federal Savings and Loan Association of Rock Hill, Rock Hill Printing & Finishing Co., Celanese Corp. of America, Annie F. Harris, John S. Simpson, Rock Hill, S.C., 11-5-80; Bowater Carolina Corp., Catawba, S.C., 11-4-80; Ashe Brick Co., Van Wyck, S.C., 11-5-80; John M. Spratt, York, S.C., 11-5-80. |



| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 11-13-80 | — | USM RETURN of svc. of S&C on deft., Catawba Timber Co. Calhoun, Tenn., 11-6-80 |
| 11-19-80 | — | NOTICE OF APPEARANCE by Philip E. Wright represents County of Lancaster consisting of County Council, w/cert of svc. |
| 11-19-80 | 4 | MOTION (REF 11-20-80) by pltf. for an extension of time for defts to answer |
| 11-19-80 | 5 | AFFIDAVIT of Jean H. Toal in support of motion for ext of time for defts to answer |
| 11-20-80 | 6 | ORDER (CES, JR) that time of the defts. in which to answer or otherwise plead to the Complaint of the pltf. is extended to and including 20 days following the issuance by this Court of an Order disposing of the pltf's motion to certify the deft. class MLD EOD 11-20-80 |
| 11-24-80 | — | NOTICE OF APPEARANCE by Parker Whedon as counsel for Thomas B. Snodgrass Jr. |
| 11-24-80 | — | CERTIFICATE OF SERVICE by pltf. showing svc of Order (CES, JR) of 11-20-80 on defts. w/cover letter |
| 11-25-80 | — | NOTICE OF APPEARANCE by Robert M. Ward Representing deft. Celanese Corp. impleaded as Celanese Corp of America |
| 11-25-80 | — | NOTICE OF APPEARANCE by Robert M. Ward representing deft. Rock Hill Printing and Finishing Co. |
| 11-25-80 | — | NOTICE OF APPEARANCE by Robert M. Ward representing deft. Herald Publishing Co. |
| 11-25-80 | — | NOTICE OF APPEARANCE by William I. Ward representing deft. Duke Power Co. and Crescent Land & Timber Corp. |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 11-25-80 | — | NOTICE OF APPEARANCE by W. Wallace Gregory, Jr., Representing defts. Duke Power Co. and Crescent Land & Timber Corp. |
| 11-26-80 | — | NOTICE OF APPEARANCE by O.G. Calhoun representing deft. Bowater Carolina Corp. |
| 11-26-80 | — | NOTICE OF APPEARANCE by Kenneth P. Woodington, representing deft. State of S.C., Richard W. Riley as Gov. of the State of S.C. |
| 11-28-80 | — | NOTICE OF APPEARANCE by W. Ryan Hovis representing deft. Flint Realty & Const. Co. |
| 12-2-80 | — | NOTICE OF APPEARANCE by C.W.F. Spencer, Jr., Emil W. Wald, representing City of Rock Hill w/cert of mailing |
| 12-2-80 | — | NOTICE OF APPEARANCE by C.W.F. Spencer, Jr., Emil W. Wald, representing Citizens and Southern Bank of South Carolina w/cert of mailing |
| 12-3-80 | — | NOTICE OF APPEARANCE by Palmer Freeman, Jr., representing deft. J. M. Hinson |
| 12-9-80 | — | NOTICE OF APPEARANCE by R. Carl Hubbard, representing defts., Hugh William Close, James Bradley, Lillian Crandall Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliott Close, and Hugh William Close, Jr. w/letter of mailing |
| 12-9-80 | — | NOTICE OF APPEARANCE by Nolen L. Brunson representing defts. Duke Power Co. and Crescent Land & Timber Corp. |
| 12-18-80 | — | USM RETURN of svc of S&C on deft., C.H. Albright, Rock Hill, S.C., 12-15-80 |
| 12-26-80 | — | NOTICE OF APPEARANCE (36) by J.D. Todd, Jr., representing defts. C.H. Albright, Ned Albright, John Wesley, Jr., Jessie G. |



| DATE | NR. | PROCEEDINGS |
|---|---|---|
| | | Anderson, John Wesley Anderson, David Goode, Anderson Ardrey Farms, W.B. Ardrey, Elizabeth Ardrey Grimball, Ashe Brick Co., F.S. Barnes, Jr., Archie B. Carroll, Jr., R.A. Fewell, Annie F. Harris, Theodore W. Hutchinson, W.A. McCorkle, Jr., Mary T. McCorkle, F.M. Mack, Jr., J.E. Marshal, Jr., Nisbet Farms, Inc., Eugina Nisbet White, Mary Nisbet Purvis, Elizabeth Nisbet Martin, W.O. Nisbet, III, William O. Nisbet, Janet Nisbet Goode, Rebecca Nisbet Rencher, William R. Simpson, Robert T. Simpson, John S. Simpson, Thomas Brown Snodgrass, Marshall W. Walker, Hudg M. White, Jr., Robert T. Yoder, Heirs of John Marshall Wilkins, II, Heirs of John W. Ardrey w/letter of mailing |
| 12-26-80 | — | NOTICE OF APPEARANCE by J.D. Todd, Jr., representing defts., Celanese Corp. of America; Wachovia Bank and Trust Co.; and Tega Cay Association, now known as The Point Wylie Co. w/letter of mailing |
| 12-26-80 | — | NOTICES OF APPEARANCE (16) by J.D. Todd, Jr.; O.G. Calhoun; John C. Christie; Dan M. Byrd, Jr., representing defts., Bowater Carolina Corp.; Catawba Timber Co.; Crescent Land and Timber Corp.; Duke Power Co.; Rock Hill Printing and Finishing Co., Southern Railway Co.; Springs Mills, Inc.; Hugh William Close; James Bradley; Lillian Crandle Close; Frances Allison Close; Leroy Springs Close; Patricia Close; William Elliott Close; Hugh William Close, Jr., Church Heritage Village & Missionary Fellwoship w/letter of mailing |
| 1-5-81 | — | USM RETURN of svc of S&C&Motion on deft., Pauline B. Gunter Pembrook, N.C., 12-19-80 |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 1-12-81 | 7 | STATUS CONFERENCE ORDER (JPW) directing clerk to enter this Order; agrees w/ Order (CES, JR) of Court 11-20-81; it is directed that the status conference be held at Cola., Wed., 2-18-81 at 10:00 A.M.; clk to svc cpys of Order on counsel of Record. MLD EOD 1-13-81 |
| 1-20-81 | — | LETTER showing Lynn B. Dutton, General Attorney, Southern Railway |
| 1-20-81 | — | NOTICE OF APPEARANCE (3) by David A. White, Esq. representing Roddey Estates, Inc.; W. Watson Barron; C.D. Reid, Jr., |
| 1-30-81 | — | NOTICE OF APPEARANCE by John M. Spratt, Jr., representing Hiram Hutchinson, Jr., John M. Spratt, Jr., (pro se) and Heritage Village Church and Missionary Fellowship, Inc. w/letter of mailing |
| 2-2-81 | — | NOTICE OF APPEARANCE by Mitchell K. Byrd and J.D. Todd, Jr., representing Deft., Pauline Gunter, |
| 2-12-81 | — | MOTION FOR LEAVE TO APPEAR (REF 2-18-8.) by deft., the State of SC, Richard W. Riley as Gov.; County of Lancaster, etc.; City of Rock Hill, etc.; unnamed propsective members of the ceft. class the County of York and the Town of Fort Mill w/letter of mailing (mem incorporated) to admit certain counsel from out of state |
| 2-16-81 | — | LETTER removing O.G. Calhoun and John C. Christie as counsel for defts., Heritage Village Church and Missionary Fellowship, Inc. |
| 2-17-81 | 8 | MEMORANDUM (RECEIVED) (COPY) by various named defts., in response to Order (JPW) filed 1-12-81, w/cert. of svc. |
| 2-18-81 | — | STATUS CONFERENCE (JPW, gs) discussion on procedure, whether to certfy class or proceed on rule 12(b) motions- Court grants |



| DATE | NR. | PROCEEDINGS |
|---|---|---|
| | | plt counsel 30 days to file further memos in support of certification, then will rule on if class to be certified or proceed on motions |
| 2-18-81 | 9 | ORDER (JPW) that Bowater North American Corporation be substituted as party deft in place of Bowater Carolina Corporation. MLD EOD 2/18/81 |
| 3-17-81 | — | NOTICE OF APPEARANCE by Daivd A. White representing deft., J.P. Stevens Co. |
| 3-20-81 | 10 | MEMORANDUM (RECEIVED) by pltfs in response to the mem of various defendant in response to Court's Status Conf. Order. w/ cert. of svc. w/attachments |
| 3-30-81 | 11 | MEMORANDUM (RECEIVED) by various defts., concerning the Order of 1-12-81 w/ attachments and cert of svc. |
| 4-10-81 | — | TRANSCRIPT of hearing held 2-18-81 ——— ——— William 4-14-81 Vol. II |
| 4-20-81 | 12 | ORDER (JPW)<br>1-defts have 60 days from date of Order to file motion pursuant to rule 12(b)<br>2-pltf have 60 days to file a response to rule 12(b) motions<br>3-defts have 30 days to reply to pltf's response to the 12(b) motions<br>4-all matters in litigation are stayed except those pertaining to 12(b) motions including class action certification motions and rule 56 motions<br>5-further proceedings shall be held in Rock Hill unless otherwise specified by the Court<br>6-times become eff when order filed w/Court MLD EOD 4-20-81 |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 6-19-81 | — | MOTION (REF 6-25-81) by defts to dismiss for failure to state a claim w/attached table of contents, table of authorities, Federal Statutes; w/cert of svc. |
| 6-19-81 | — | MEMORANDUM (RECEIVED) by defts in support of motion to dismiss w/cert. svc. (att to motion) |
| 6-19-81 | — | APPENDIX (RECEIVED) of memorandum in support cf motion to dismiss defts. Vol. III |
| 6-25-81 | — | MOTION (REF 6-14-82) corrected and substituted copy of the defts. to dismiss for failure to state a claim w/attached cert of svc. Vol. IV |
| 6-25-81 | — | MEMORANDUM (RECEIVED) by deft. in support of motion to dismiss (corrected and substitutied copy) w/cert of svc. Vol. I |
| 8-26-81 | — | RESPONSE (RECEIVED) by pltf to deft's motion to dismiss w/exhibit in separate bound folder, w/cert of svc. Vol. V and VI |
| 09-18-81 | 13 | HEARING ORDER (JPW) counsel will refer to J.P.W.'s order of April 20, 1981, relating to defts' 12(b) motions to pltfs' response and the reply and briefs of counsel; a hearing is set for Wednesday, Oct. 28, 1981, at Rock Hill commencing at 10:00 a.m. at which time defts may present oral argument plaintiffs will be heard in reply at 2:00 P.M. on same date. In the event the arguments are unfinished on the 28th this Court will be avail the next day, Oct. 29. EOD 09-21-81. MLd. |
| 9-18-81 | — | REPLY MEMORANDUM (RECEIVED) by defts in support of Motion to Dismiss w/ cert. svc. Vol. VII |



| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 10-20-81 | 14 | MOTION (Ref 10-28-81) by pltf. for leave to file supplemental memorandum in response to defts' motion to dismiss w/cert of svc. |
| 10-20-81 | 15 | MEMORANDUM (RECEIVED) by pltf. in support of motion for leave to file supplemental meorandum and supplemental memorandum w/cert of svc. |
| 10-28-81 | — | MOTION HEARING (JPW/jl) deft's motion to dismiss - argued, pltf's given 60 days to submit material supporting tribal existence deft's to respond. Case cont for 60 days; Pltf's motion for leave to file supplemental mem. - granted; deft's request for motion to dismiss or in the alt for s/j - heard |
| 10-28-81 | — | MEMORANDUM (RECIEVED) by defts. in response to pltf's suppl mem (w/cert of svc.) Vol. VIII |
| 10-30-81 | 16 | MEMORANDUM AND ORDER (JPW) stating the decision of the motion to dismiss will be based on Rule 56; directing counsel to obtain info from the BIA as to the relationship between them (BIA) and the Indians (re - tribal status) either in the form of aff, cert, or record during the intervening years (except 1943 - 1962) w/in 60 days counsel to file such material in support of or contra to the motion under rule 56 at which time a further hearing will be directed. mdleod 10-30-81 |
| 11-25-81 | 17 | MOTION (REF ————) by defts for supplemental order w/cert of svc. (w/attached prop order) |
| 11-25-81 | 18 | MEMORANDUM (RECIEVED) by defts in support of motion for supplemental order w/attached cpy of letter w/cert of svc. |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 12-7-81 | 19 | MEMORANDUM (RECEIVED) by pltf. in response to defts motion for entry of supplemental order w/cert. of svc. |
| 12-12-81 | 20 | MOTION (Ref ) w/cert. svc. by defts for leave to file supplemental memorandum w/memo in support incorporated. (Original Supplemental Memorandum attached). |
| 12-14-81 | 21 | ATTACHMENT (RECEIVED) by defts. Dennison opinion to be attached to mem w/letter of mailing |
| 1-7-82 | — | TRANSCRIPT of hearing held 11-28-81 Vol. IX |
| 1-18-82 | 22 | MEMORANDUM AND ORDER (JPW) on or before 2-26-82, pltf and moving defts shall submit proposed orders for the resolution of the motion for s/j; orders to address only the issues briefed and argued by the parties; defts appendices and pltfs exhibits stipulated that they are in evidence and are a historical record and are the basis for the ruling on the motion; w/in 20 days after the prop orders are exchanged by counsel supplemental briefs may be filed; thereafter oral arguments may be directed; eff when filed w/ clerk in Cola. mld eod 1-18-82 |
| 2-26-82 | 23 | PLAINTIFF'S PROPOSED ORDER w/cert of svc. |
| 2-26-82 | — | DEFENDANTS' PROPOSED ORDER GRANTING SUMMARY JUDGMENT w/ cert of svc. Vol. X |
| 3-22-82 | — | DEFENDANTS' SUPPLEMENTAL MEMORANDUM (RECEIVED) concerning pltf's proposed order w/cert of svc. Vol. XI |
| 3-22-82 | — | PLAINTIFF'S SUPPLEMENTAL MEMORANDUM (RECEIVED) concerning deft's motion for s/j-w/cert of svc. Vol. XII |
| 4-8-82 | 24 | MOTION (REF ————) by pltf for leave to file memorandum in rebuttal to deft's supplemental memorandum w/cert of svc. (mem incorporated in body of motion) |



| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 4-16-82 | 25 | MOTION (REF ————) by defts for leave to file response to pltf's rebuttal memorandum w/cert of svc. |
| 4-16-82 | — | MEMORANDUM (RECEIVED) (Copy) by defts in support of motion for leave to file response to ptlf's mem w/cert ofsvc. Vol. XIII |
| 6-14-82 | 26 | MEMORANDUM AND ORDER (JPW) granting deft's motion for s/j mld eod 6-14-82 |
| 6-14-82 | 27 | JUDGMENT ORDER (JPW) entering s/j for the defts and ending action mld eod 6-14-82 |
| | | JS6 |
| 7-9-82 | 28 | NOTICE OF APPEAL by pltf.; cc's to counsel, 4CCA, Court Reporter Court (JPW). |
| 7-12-82 | 29 | AMENDED NOTICE OF APPEAL by pltf.; cc's to counsel, 4CCA, Court Reporter Court (JPW). |
| 9-23-82 | 30 | STIPULATION OF DESIGNATION OF RECORD by parties. |
| -- | 31 | Clerk's Certificate |
| 9/29/82 | | Record on Appeal forwarded to 4CCA, in 13 volumes; case papers in Vol. I, transcripts in volume II & IX, motions & memoranda in volumes III thru VIII and X through XIII. |
| 10/17/83 | | Opinion of 4CCA reversing judgment of District Court and remanding for entry of order denying defendants' motion for summary judgment and for further proceedings consistent with this opinion. |
| 6/10/85 | | Order copy of U.S. Supreme Court granting defendant's petition for writ of cert. |

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Docket No. 82-1671

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the CATAWBA NATION OF SOUTH CAROLINA,
*Appellant,*

v.

STATE OF SOUTH CAROLINA, *et al.*,
*Appellees.*

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**RELEVANT DOCKET ENTRIES**

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 08/03/82 | Case docketed. Awaiting ROA. tcb |
| 08/13/82 | DISCLOSURE STMNT, E (Southern Railway Co.), Y, filed. tcb |
| 08/16/82 | DISCLOSURE STMNT, E (Brunson), N, filed. tcb |
| 08/18/82 | DISCLOSURE STMNT, E (Lancaster Co.), N, filed. tcb |
| 08/18/82 | DISCLOSURE STMNT, E (Flint Realty, etc.), N, filed. tcb |
| 08/19/82 | DISCLOSURE STMNT, Es, Y, filed. tcb |
| 08/20/82 | DISCLOSURE STMNT, E (C&S Nat'l Bk), Y, filed. tcb |
| 08/20/82 | DISCLOSURE STMNT, E (First American Title), Y, filed. tcb |
| 08/20/82 | DISCLOSURE STMNT, E (Rock Hill), N, filed 8/16/82. tcb |



| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 08/20/82 | DISCLOSURE STMNT, E (Celanese Corp.), N, filed 8/16/82. tcb |
| 08/20/82 | DISCLOSURE STMNT, E (Herald Pub.), N, filed 8/16/82. tcb |
| 08/20/82 | DISCLOSURE STMNT, E (Spring Mills), Y, filed 8/19/82. tcb |
| 08/20/82 | DISCLOSURE STMNT, E (Ashe Brick), Y, filed 8/19/82. tcb |
| 08/20/82 | DISCLOSURE STMNT, E (Nisbet Farms), Y, filed 8/19/82. tcb |
| 08/20/82 | DISCLOSURE STMNT, Es, N, filed 8/16/82. tcb |
| 08/20/82 | DISCLOSURE STMNT, E (State of SC), N, filed. tcb |
| 08/23/82 | DISCLOSURE STMNT, E (J.P. Stevens), N, filed. tcb |
| 09/07/82 | DISCLOSURE STMNT, Es, Y, filed. tcb |
| 09/27/82 | DISCLOSURE STMNT, E (Duke Power), N, filed. tcb |
| 09/27/82 | DISCLOSURE STMNT, E (Crescent Land & Timber), N, filed. tcb |
| 10/07/82 | BRIEFING ORDER filed, A due 11/16/82. tcb |
| 10/07/82 | ORDER requiring joint brief per side, filed. tcb |
| 11/16/82 | Four page proof copies of the A brief filed HD/rba |
| 11/16/82 | JOINT MOTION (K-186) of parties for leave to defer preparation of appendix pursuant to Rule 30(c), FRAP, filed (CRL:jeh) |
| 11/23/82 | ORDER granting motion to defer prepration of appendix pursuant to Rule 30(c), FRAP, filed (CRL:jeh) Copy to counsel of record |
| 12/10/82 | MOTION (L-84) of Es for enlargement of time to file brief, filed (CRL:jeh) |
| 12/17/82 | ORDER extending time to file Es' brief to 12/20/82, filed (CRL:jeh) Copy to counsel of record |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 12/23/82 | MOTION (L-153) of A for enlargement of time to file reply brf. filed. (CRL:fls) |
| 12/29/82 | ORDER denying A's motion to ext. time to file page-proof reply/brf. filed. (CRL:fls) Copy to Steele-Jolly; Miller; Hubbard; Brunson; Ward; Lee-Erichsen-Quarles-St. Clair; White; Dutton; Spencer; Woodington; Mack; Byrd-Byrd; Duncan-Hovis; Wright; McConathy-Landes-Christie; Todd; Ward-Gregory. (jt. appx. due 1/26/83.) |
| 12/20/82 | FOUR (4) Page-Proof copies of the Appellee's Brief filed. mb |
| 01/27/83 | MOTION (A-209) of A for leave to file reply brief in excess of 25 pages, filed. (PLM:bel) MOTION DENIED. |
| 2/11/83 | MOTION (B-87) of Es for leave to file a brief in response to new matter raised in A's reply brief, filed (BMM:jeh) Submitted to KKH, JMS, JDB on 2/18/83 |
| 2/23/83 | ORDER entered at the direction of JDB granting motion (B-87). Copies mailed to Steele/Jolly, Miller, Hubbard, Brunson, Ward, Lee/Erichsen Quarles/St. Clair, White, Dutton, Spencer, Woodington, Mack, Byrd/Byrd/Black, Duncan/Hovis, Wright, McConathy/Landes/Christie, Todd, Ward/Gregory, Bender/Toal, Jones. (BMM:jd) |
| 2/24/83 | A Memorandum in oposition to E's motion to file supplemental brief. (B-87) |
| 2/24/83 | E's motion (B-214) for enlargement of time for oral argument. Submitted to panel (KKH/JMS/JDB) BMM:jd |



| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 3/3/83 | ORDER denying E's motion (B-214) for enlargement of time for oral argument. BMM:jd Copies to Steele, Jolly, Miller, Hubbard, Brunson, Ward, Lee, Erichsen, Quarles, St. Clair, White, Dutton, Spencer, Woodington, Mack, Byrd, Duncan, Wright, McConathy, Todd, Ward, Bender, Toal, Jones. |
| 03/07/83 | DISCLOSURE STMNT, A, Y, filed. tcb |
| 9/1/83 | Supplemental Authority submitted by E and filed. jd<br>Transmitted to KKH/JMS/JDB on 9/2/83. (BMM:jd) |
| 10/25/83 | PETITION FOR REHEARING (J-124) and suggestion for rehearing en banc of Es, filed (SAW:jm) Transmitted to KKH, JMS, JDB w/copy to circuit judges on 10/26/83 |
| 11/16/83 | ANSWER of A to petition for rehearing and suggestion for rehearing en banc filed (SAW:jm) Transmitted to KKH, JMS, JDB w/copy to circuit judges on 11/17/83 |
| 12/20/83 | ORDER granting rehearing en banc. (BMM:jd) Copy to counsel. |
| 9/5/84 | MOTION of Es (I-20) for stay of mandate, filed. jd<br>Transmitted to in banc ct. on 9/7/84. (BMM:jd) |
| 9/20/84 | ORDER granting motion of Es for stay of mandate, filed (SAR:jm) Copy to Steele-Jolly; Miller; Hubbard; Brunson; Grier; Lee-Erichsen-Quarles-St. Clair; White; Spencer; Woodington; Mack; Byrd-Byrd; Duncan-Hovis; Wright; McConathy; Todd; Ward-Gregory; Bender-Toal; Jones; Dutton; Lanes-Christie |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 10-15-84 | Mortion (J-99) of Es for a 30-day extension of this Court's stay of mandate pending application for certiroar, filed (SAR:cw) |
| 10-17-84 | LETTER granting Es motion J-99, filed (SAR:cw) Copy sent to Steele; Miller; Hubbard; Brunson; Grier; Lee-Erichsen-Quarles-St. Clair; White; Spencer; Woodington; Mack; Byrd-Byrd; Duncan-Hovis; Wright; McConathy-Landes-Christie; Todd; Ward-Gregiry; Bender-Toal; Jones; Dutton. |



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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Civil No. 80-2050-6

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
also known as the
CATAWBA NATION OF SOUTH CAROLINA,
*Plaintiff*,

v.

STATE OF SOUTH CAROLINA, RICHARD W. RILEY as Governor of the State of South Carolina; COUNTY OF LANCASTER, and its County Council consisting of FRANCIS L. BELL as Chairman, FRED E. PLYLER, ELDRIDGE EMORY, ROBERT L. MOBLEY, BARRY L. MOBLEY, L. EUGENE HUDSON, LINDSAY PETTUS; CITY OF ROCK HILL, J. EMMETT JEROME, as Mayor, and its City Council consisting of MELFORD A. WILSON, ELIZABETH D. RHEA, MAXINE GILL, WINSTON SEARLES, A. DOUGLAS ECHOLS, FRANK W. BERRY, SR.; BOWATER CAROLINA CORPORATION; CATAWBA TIMBER CO.; CELANESE CORPORATION OF AMERICA; CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA; CRESENT LAND & TIMBER CORP.; DUKE POWER COMPANY; FLINT REALTY AND CONSTRUCTION COMPANY; HERALD PUBLISHING COMPANY; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION; ROCK HILL PRINTING & FINISHING COMPANY; RODDEY ESTATES, INC.; SOUTHERN RAILWAY COMPANY; SPRINGS MILLS, INC.; J. P. STEVENS & COMPANY; TEGA CAY ASSOCIATES; WACHOVIA BANK AND TRUST COMPANY; ASHE BRICK COMPANY; CHURCH HERITAGE VILLAGE & MISSIONARY FELLOWSHIP; NISBET FARMS, INC.; C. H. ALBRIGHT, NED ALBRIGHT; J.W. ANDERSON, JR., JOHN MARSHALL WILKINS II, JESSE G. ANDERSON,

JOHN WESLEY ANDERSON, DAVID GOODE ANDERSON; W.B. ARDREY, JR., ELIZABETH ARDREY GRIMBALL, JOHN W. ARDREY, ARDREY FARMS; F. S. BARNES, JR.; W. WATSON BARRON, WILSON BARRON; ARCHIE B. CARROL, JR.; HUGH WILLIAM CLOSE, JAMES BRADLEY, FRANCIS LAY SPRINGS, LILLIAN CRANDALL CLOSE, FRANCIS ALLISON CLOSE, LEROY SPRINGS CLOSE, PATRICIA CLOSE, WILLIAM ELLIOT CLOSE, HUGH WILLIAM CLOSE, JR.; ROBERT A. FEWELL; W. J. HARRIS, ANNIE F. HARRIS; T.W. HUTCHINSON, HIRAM HUTCHINSON, JR.; J. R. MCALHANEY; F. M. MACK, JR.; ARNOLD F. MARSHALL; J. E. MARSHALL, JR.; C. D. REID, JR.; WILL R. SIMPSON, JOHN S. SIMPSON, ROBERT F. SIMPSON; THOMAS BROWN SNODGRASS, JR.; JOHN M. SPRATT; MARSHALL E. WALKER; HUGH M. WHITE, JR.; JOHN M. BELK; JANE NISBET GOODE, R. N. BENCHER, W. O. NISBET III; PAULINE B. GUNTER; J. MAX MINSON; W. A. MCCORKLE, MARY MCCORKLE; WILLIAM O. NISBET; EUGENIA NISBET WHITE, MARY NISGET PURVIS, E. N. MARTIN; ROBERT M. YODER,

*Defendants.*

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**COMPLAINT**

## NATURE OF THE ACTION

1. This is a civil action seeking a declaration of the ownership and right of possession of the Catawba Indian Tribe to the lands within its 1763 Treaty reservation in York, Lancaster and Chester Counties, South Carolina, which lands are subject to restrictions against alienation under federal law. The Catawba Tribe also seeks to be restored to possession of its reservation lands and seeks historic trespass damages for the period of its dispossession. Defendant are sued individually and as representatives of all similarly situated persons pursuant to Rule 23 of the Federal Rules of Civil Procedure.



## JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1337 and 1362. The amount in controversy exceeds $10,000, exclusive of interest and costs with respect to each defendant.

3. Plaintiff's claims for relief arise under the 1760 Treaty of Pine Tree Hill; the Proclamation of October 7, 1763; the November 10, 1763 Treaty of Augusta, Article I Section 8 and Article 6 of the United States Constitution; and the Indian Nonintercourse Act, 25 U.S.C. § 177.

## DESCRIPTION OF THE SUBJECT LAND

4. From time immemorial to the time of the acts complained of herein, the Catawba Tribe owned and occupied a tract of land roughly 15 miles square, or 144,000 acres, which land was surveyed and set aside for their exclusive use and occupancy pursuant to two treaties with the British Crown in 1760 and 1763. The reservation was surveyed by Samuel Wyly and a copy of his map of the reservation, dated February 22, 1764, is annexed hereto as Exhibit A. The boundary of the reservation begins at the confluence of Twelve Mile Creek and the Catawba River and continues along Twelve Mile Creek in a northeasterly direction to the point where Twelve Mile Creek intersects the present boundary between North and South Carolina. From there, the reservation boundary follows the boundary between North and South Carolina to the northwest approximately fifteen miles and then to the southwest, at an angle of 90 degrees, approximately seven and one-half miles to the Catawba River. From there, the boundary between the states separates from the reservation boundary, the reservation boundary continuing in a straight line approximately an additional seven and one-half miles to a point west of the present city of Rock Hill, South Carolina. From there, the boundary continues at an angle of 90 degrees in a straight line to the southeast for a distance of approximately fifteen miles to a point

south of the City of Rock Hill and thence in a northeasterly direction to the point of origin at the confluence of the Catawba River and Twelve Mile Creek. Exempted from the subject lands are the lands described in Paragraphs 12 and 13 of this Complaint.

PARTIES

5. Plaintiff Catawba Indian Tribe of South Carolina is a tribe of Indians which has resided in the State of South Carolina since time immemorial. The Tribe presently resides on approximately 630 acres outside the City of Rock Hill, South Carolina, which lands are held in beneficial trust for the Tribe by the State of South Carolina. The Catawba Tribe is duly organized under the laws of the State of South Carolina as a non-profit corporation. Plaintiff Catawba Indian Tribe, Inc., is the successor to the Catawba Indian Tribe which was signatory to the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763.

6. The defendants, and each of them, claim an interest in and title to certain of the lands which are the subject matter of this litigation.

7. Any defendant who claims any portion of the subject land purporting to act as an officer of the State of South Carolina, does so in excess of such defendant's authority as an officer of the State of South Carolina and in violation of 25 U.S.C. § 177, and Article VI of the Constitution of the United States.

8. The named defendants are sued both individually and as representatives of all other persons who assert an interest in any portion of the subject lands, excepting members of the Catawba Indian Tribe of South Carolina.

9. The above described class exceeds 27,000 thousand persons and is so numerous that joinder of all members is impracticable; all questions of law and fact relating to the basic issue of liability are common to the class of defendants and the defenses of the named representative parties are typical of the defenses of the class of defendants; the named representative parties include major public and private claimants of the subject land and the named defendants will fairly and adequately protect the interests of the class of defendants.



10. The prosecution of separate actions against individual members of the defendant class would create a risk of inconsistent or varying judgments which would, as a practical matter, substantially impair the ability of other class members, not parties to the judgments, to protect their interests.

11. The questions of law and fact common to the class predominate over questions affecting only individual members and a defendant class action is superior to other procedures for the fair and efficient adjudication of the controversy.

FACTS OF THE CLAIM

12. In 1760, the Honorable Edmund Atkin, Esq., His Majesty the King of England's Agent to and Superintendent for Indian Affairs in the Southern District of North America, negotiated a Treaty with the Catawba Indian Nation whereby the Catawba Nation agreed to surrender its claims to a tract encompassing all lands within a 30 mile radius of the Catawba towns, which tract had been recognized as Catawba Indian Country by the Colony of South Carolina, in return for being permanently and quietly settled on a tract of land fifteen miles square, which was to be surveyed to prevent intruders and upon which a fort was to be built for the Catawba's protection. This treaty is known as the Treaty of Pine Tree Hill.

13. On October 7, 1763, King George III of England issued a Proclamation which ordered that no warrants of survey or patents be issued upon any lands which had

been reserved to the Indians and further forbade private purchases of lands from the Indians and settlement upon Indian lands.

14. On November 10, 1763, the Governors of the Southern Colonies, including South Carolina, and His Majesty's Superintendant for Indian Affairs in the Southern District, John Stuart, negotiated the Treaty of Augusta with, among others, the Catawba Indian Nation, which Treaty provided that the Catawba Nation would remain satisfied with the agreement contained in the 1760 Treaty of Pine Tree Hill and the Governors and Superintendant on their part promised that the terms of the Treaty of Pine Tree Hill would be fulfilled.

15. On July 22, 1790, Congress enacted the Indian Trade and Intercourse Act, presently codified at 25 U.S.C. § 177, which provided then as it does now that no interest of any kind may be acquired in the lands of any Indian tribe other than by treaty or convention entered into pursuant to the Constitution, to which the United States is a party. Any interest acquired in violation of 25 U.S.C. § 177 is void in law and equity.

16. On March 3, 1840, the State of South Carolina, without the consent and participation of the United States, concluded the Treaty of Nation Ford between the State and the Catawba Indian Tribe, whereby the State purported to extinguish the Indian title of the Catawba Tribe to the entire 15 mile square tract secured to the Tribe in the 1760 and 1763 Treaties described in paragraphs 12 and 14 above. In return, the State promised to purchase for the Catawbas, at a cost of $5,000, a tract of land either in Haywood County, North Carolina, or in a similarly mountainous and unpopulated area in South Carolina and in addition agreed to pay the Tribe $2,500 cash and $1,500 per year for nine years.

17. On December 18, 1840, the Legislature of the State of South Carolina enacted legislation ratifying and



confirming the March 3, 1840 State treaty, which Act provided for the conveyance of the title and interest purportedly acquired by the State of South Carolina in Catawba Reservation lands to the non-Indian lessees of such lands upon the application and payment by the lessees of certain fees or taxes.

18. The Congress of the United States has never ratified or otherwise consented to the alienation of the Catawba Indian Reservation as required by 25 U.S.C. § 177. The title or right of possession to the Catawba Indian Reservation lands which are the subject of this suit thus remains in the Catawba Indian Tribe and the subject land is not and never has been the property of any other person or party. The Tribe's right and title to these lands is now and has since 1789 been protected by the Fifth Amendment to the United States Constitution.

19. The State did not purchase a new reservation for the Catawba Tribe in North Carolina or in South Carolina as required by the 1840 Treaty. Instead, in 1842 the State of South Carolina purchased for the Catawba Tribe a 630 acre tract, located within the boundaries of the 1763 reservation which the Tribe purportedly ceded in the 1840 Treaty, for the sum of $2,000, which tract remains to this day the only lands actually occupied and enjoyed by the Catawba Tribe and these lands are exempted from this claim.

20. In 1943, the Catawba Tribe, the State of South Carolina, and the United States Department of the Interior entered into a Memorandum of Understanding whereby 3,434 acres of land, more or less, all of which was within the boundaries of the 1763 Treaty reservation, was acquired and taken into trust by the Secretary of the Interior for the Catawba Tribe. In 1959, Congress enacted the Catawba Division of Assets Act, Public Law 86-322, 73 Stat. 592, 25 U.S.C. §§ 931-8, which Act lifted federal restrictions on alienation to the 3,434 acres, more or less, acquired for the Tribe pursuant to

the 1943 Memorandum of Understanding and those lands are exempted from this claim.

CLAIM FOR RELIEF

21. The 1840 transaction between the State of South Carolina and the Catawba Indian Tribe, known as the Treaty of Nation Ford, was void for violation of the 1760 Treasy of Pine Tree Hill, the Proclamation of 1763, the 1763 Treaty of Augusta, the Indian Nonintercourse Act (25 U.S.C. § 177) and Article 1, Sections 8 and 10 of the United States Constitution, and any right, title, or interest purportedly acquired pursuant to the 1840 Treaty of Nation Ford is likewise void.

22. Defendants and each of them claim an interest in or ownership to a portion of the subject lands and are keeping plaintiff out of possession of its lands in violation of the 1760 Treaty of Pine Tree Hill, the 1763 Treaty of Augusta, the Proclamation of 1763, the Indian Nonintercourse Act, 25 U.S.C. § 177, Article I section 8 of the United States Constitution and Article 6 of the United States Constitution. Such violations infringe upon plaintiff's title and right of possession to the subject lands as protected by 25 U.S.C. § 177 and keep plaintiff out of possession of its lands to plaintiff's great damage.

23. Defendant State of South Carolina, by entering into the 1840 transaction, known as the Treaty of Nation Ford, with the Catawba Indian Tribe and thereby purporting to acquire the right, title and interest of the Catawba Tribe in its treaty reservation without the consent or participation of the United States, violated the provisions of the Nonintercourse Act, presently codified at 25 U.S.C. § 177, and Article I, Sections 8 and 10, of the United States Constitution. Such violations infringe upon plaintiff's title and right of possession to the subject lands, protected by 25 U.S.C. § 177 and keep



plaintiff out of possession of its lands to plaintiff's great damage.

WHEREFORE, Plaintiff prays that this Court:

1. Order that this action shall be maintained as a class action pursuant to Rule 23, Fed. R. Civ. P., upon such terms as the Court deems just;

2. Declare that plaintiff has the right to possession of every portion of the subject land which is claimed or possessed by any defendant;

3. Order that plaintiff be restored to immediate possession of all portions of the subject land which are claimed in whole or in part by any defendant or member of the defendant class, as such lands are described in paragraph 4 of this Complaint, except that plaintiff does not request such relief with respect to the lands described in paragraphs 19 and 20 of this Complaint or any lands which are owned by a member of plaintiff Catawba Tribe of Indians.

4. Declare that plaintiff is entitled to receive trespass damages, including the amount of the fair rental value and profits for each portion of the subject land claimed by any defendant for the entire period of plaintiff's dispossession; and determine the amount of such damages and profits.

5. Award plaintiff the costs of this action and attorneys fees; and

6. Award such other and further relief as the Court deems just.

DATED:

Respectfully submitted,

DON B. MILLER
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

JEAN H. TOAL
Belser, Baker, Barwick, Toal & Bender
Suite 303, 1213 Lady Street
P.O. Box 11848
Columbia, South Carolina 29211
(803) 799-9091

ROBERT M. JONES
MIKE S. JOLLY
RICHARD STEELE
123 Workman Street
Rock Hill, South Carolina 29730
(803) 327-1179

Attorneys for Plaintiff

[Map dated February 22, 1764 attached to the Complaint as Exhibit A omitted in printing]



IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

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C. A. No. 80-2050

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Plaintiff,*

vs.

STATE OF SOUTH CAROLINA, *et al.*,
*Defendants.*

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**MOTION TO DISMISS**

Pursuant to Fed. R. Civ. P. 12(b)(6) and this Court's Order filed April 20, 1981, certain named defendants move to dismiss the Complaint for failure to state a claim upon which relief can be granted.

This Motion is based on legislation enacted in 1959 and commonly referred to as the "Catawba termination act." 25 U.S.C. §§ 931-938. This act has affected the legal status of the Catawbas in a manner which now prevents plaintiff from stating any claim upon which relief can be granted. As more fully set forth in the accompanying Memorandum in Support of Motion to Dismiss, there are four independent grounds for this Motion:

(1) As a consequence of the Catawba termination act, state law, including a state statute of limitation, applies to the plaintiff and clearly bars its claims;

(2) As a consequence of the Catawba termination act, plaintiff is not an "Indian tribe" within the meaning of the Nonintercourse Act. 25 U.S.C. § 177;

(3) As a consequence of the Catawba termination act, the challenged transfer has been ratified by Congress; and

(4) As a consequence of the Catawba termination act, the plaintiff cannot establish the continuing trust relationship with the United States required by the Nonintercourse Act.

For all of the reasons discussed in the accompanying Memorandum, defendants request an Order dismissing this action.

Respectfully submitted,

JOHN C. CHRISTIE, JR.
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania
Avenue, N.W.
Washington, D.C. 20006
(202) 466-6300

JAMES D. ST. CLAIR
JAMES L. QUARLES III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE and DORR
60 State Street
Boston, Massachusetts 02109
(617) 742-9100

DANIEL R. MCLEOD
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
State of South Carolina
Rembert Dennis Building
Columbia, South Carolina 29211
(803) 758-8667



J.D. TODD, JR.
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD
& MANN
217 East Coffee Street
Greenville, South Carolina 29602
(803) 242-6440

DAN M. BYRD, JR.
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, South Carolina 29730
(803) 324-5151

By: /s/ John C. Christie, Jr.
JOHN C. CHRISTIE, JR.

One of the attorneys of record
for the named defendants

PLTF. EX. 6

## GOVERNORS' AND SUPERINTENDANT'S REPLY TO THE CATAWBAS, NOVEMBER 9, 1763 COLONIAL RECORDS OF NORTH CAROLINA

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To Col° Ayres and Brothers of the Catawbas.

It gives us great pleasure and satisfaction to find that the good Talk which we gave you from Our Great King and Father of both the Red and White Children is so satisfactory to you as you have always been fast Friends to all his White children so our King and Father holds out his arms to receive and protect you from all your enemies and is very sensible of your constant Love and Friendship for all your White Brothers and you may be assured of his confirming to you all your just claims to your Lands and Hunting Grounds pursuant to the Agreement made between your Nation and his Governor of South Carolina and M^r^ Atkins his Superintendant of Indian Affairs upon your having a Fort built for your Protection from your Enemies when you deserted your old Towns which was then agreed upon on both sides to be a square of Fifteen Miles to be laid out on both sides of the Catawba River and part of the Line was actually surveyed.

If you stand to your former Agreement your Lands shall be immediately surveyed and marked out for your use but if you do not your claim must be undecided till our Great King's Pleasure is known on the other side the Waters.

* * * *

[Provisions dealing with the Cherokees omitted]

* * * *

The Catawbas upon appearing satisfied with the Line of 15 Miles square were informed that a new Survey should be made and when the Line was run the People



settled within should be removed and no new Warrants granted them or any others to settle within those Limits. Upon which they desired a new Line should be run out immediately.

The Catawbas being asked if they approved Col° Ayres as their Chief or Emperor answered unanimously Yes. In consequence of such their Declaration the Governor and Superintendant accepted him.

PLTF. EX. 6

## TREATY OF AUGUSTA
## COLONIAL RECORDS OF NORTH CAROLINA

---

At a Congress held at Augusta in the Province of Georgia on the 10th of Nov: in the year of our Lord God 1763, by their Excellencies

James Wright, Georgia
Arthur Dobbs, No Carolina
Thos Boone, So Carolina
Esqrs Governors

The Honble Francis Fauquier Esqre Lieut: Gov: of Virginia and John Stuart Esqre Agent and Superintendant of Southern Indian Affairs.

A Treaty for the Preservation and continuance of a firm and perfect Peace and Friendship Between His most sacred Majesty George the Third by the Grace of God of Great Britain France and Ireland King Defender of the Faith and so forth and the several Indian Chiefs herein named who are authorized by the King's Head Men and Warriors of the Chickesaws Upper and Lower Creeks Chactaws Cherokees and Catawbas for and in behalf of themselves and their several Nations and Tribes

Article 1st

That a Perfect and perpetual Peace and sincere Friendship shall be continued between His Majesty King Geo ge the Third and all his subjects and the several Nations and Tribes of Indians herein mentioned that is to say the Chickesaws, Upper and Lower Creeks, Chactaws & Catawbas and each Nation of Indians hereby respectively engages to give the utmost attention to preserve and maintain Peace and Friendship between their People and the King of Great Britain and his subjects and shall not



commit or permit any kind of Hostilities injury or Damage whatever against them from henceforth and from any cause or under any Pretence whatsoever And for laying the strongest and purest foundation for a perfect and perpetual Peace and Friendship His most sacred Majesty has been graciously pleased to pardon and forgive all past offenses and injuries And hereby declares there shall be a general Oblivion of all Crimes Offences and Injuries that may have been heretofore committed or done by any of the said Indian Parties.

Art: 2nd

The Subjects of the Great King George and the aforesaid several Nations of Indians shall forever hereafter be looked upon as one People and the several Governors and Superintendant engage that they will encourage Persons to furnish and supply the several Nations and Tribes of Indians aforesaid with all sorts of Goods usually carried amongst them in the manner in which they now are and which will be sufficient to answer all their Wants.

In consideration whereof the Indian Parties on their Part severally engage in the most selemn manner that the Traders and others who may go amongst them shall be perfectly safe and secure in their several persons and Effects and shall not on any account or pretence whatsoever be molested or disturbed whilst in any of the Indian Towns or Nations or on their journey to or from the Nations.

Art: 3d

The English Governors and Superintendant engage for themselves and their successors as far as they can that they will always give due attention to the Interest of the Indians and will be ready on all Occasions to do them full and ample justice. And the several Indian Parties do expressly promise and engage for themselves severally and for their several Nations and Tribes pursuant to the full Right and Power which they shall have so to do that

they will in all cases and upon all occasions do full and ample justice to the English and will use their utmost endeavours to prevent any of their People from giving any disturbance or doing any damage to them in the Settlements or elsewhere as aforesaid either by stealing their Horses killing their Cattle or otherwise or by doing them any Personal hurt or injury And that if any damage be done as aforesaid satisfaction shall be made for the same to the Party injured and that if any Indian or Indians whatever shall hereafter murder or kill a White Man the Offender or Offenders shall without any delay excuse or pretence whatsoever be immediately put to death in a public manner in the Presence of at least two of the English who may be in the Neighborhood where the offence is committed.

And if any White Man shall kill or murder an Indian such White Man shall be tried for the Offence in the same manner as if he had murdered a White Man and if found guilty shall be executed accordingly in the presence of some of the relations of the Indians who may be murdered if they choose to be present.

Art: 4.th

Whereas Doubts and Disputes have frequently happened on account of Encroachments or supposed encroachments committed by the English Inhabitants of Georgia on the lands or hunting grounds reserved and claimed by the Creek Indians for their own use.

Wherefore to prevent any mistakes Doubts or Disputes for the future and in consideration of the great marks of Clemency and Friendship extended to us the said Creek Indians. We the King's Head Men and Warriors of the several Nations and Towns of both Upper and Lower Creeks by Virtue and in Pursuance of the full Right and Power which we now have and are possessed of Have consented and agreed that for the future the Boundary between the English Settlements and our Lands and hunting



Grounds shall be known and settled by a Line extending up Savannah River to Little River and back to the Fork of Little River to the Ends of the South Branch of Briar Creek and down that Branch to the Lower Creek Path and along the Lower Creek Path to the Main Stream of Ogeechee River and down the Main Stream of that River just below the Path leading from Mount Pleasant and from thence in a Line cross to Santa Savilla on the Matamaha River and from thence to the Southward as far as Georgia extends or may be extended to remain to be regulated agreeable to former Treaties and His Majesty's Royal Instruction a copy of which was lately sent to you.

And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

And we do by these Presents give grant and confirm unto his most sacred Majesty King George the Third all such Lands whatsoever as we the said Creek Indians have at any time heretofore been possessed of or claimed as our hunting grounds which lye between the sea and the River Savannah and the Lines herein before mentioned and described to hold the same unto the Great King George and his successors for ever. And we do fully and absolutely agree that from henceforth the above Lines and Boundary shall be the mark of Division of Lands between the English and Us the Creek Indians notwithstanding any former agreement or boundary to the contrary. And that we will not disturb the English in their Settlements or otherwise within the Lines aforesaid.

In consideration whereof it is agreed on the Part of his Majesty King George that none of His subjects shall settle upon or disturb the Indians in the Grounds or Lands to the Westward of the Lines herein before described and that if any shall presume to do so, then on complaint made to the Indians the party shall be proceeded against for the same and punished according to the Laws of the English.

In Testimony whereof we the underwritten have signed this present Treaty and put to it the Seals of our Arms the day and year above written. And the several Kings and Chiefs of the several Nations and Tribes of Indians have also sent their Hands and Seals to the same at the Time and Place aforesaid.

JA. WRIGHT Governor of Georgia (L.S.)
ARTHUR DOBBS Governor of North Carolina (L.S.)
THOS. BOONE Gov. of South Carolina (L.S.)
FRAN. FAUQUIER Lt. Gov. of Virginia (L.S.)
JOHN STUART Supert. South District (L.S.)
—— MATTAHIS —— Mark (L.S.) Col. Ayres's Mark (L.S.)
CAPT. ELLICK —— A Mark (L.S.) Illegible (L.S.)
LAMPRAFFI —— Mark (L.S.) LARVUIS X mark (L.S.)
HOOTLIPOAKATELI —— Mark (L.S.) Illegible (L.S.)
NARCUQUESEAPQUO'S —— Mark (L.S.) JIFTOIS Mark —— (L.S.)
CHIKA. MUOS mark —— (L.S.) THE WOLFES Mark —— (L.S.)
THURASFURMASTOBIJET Mark —— (L.S.) WILLANAWA —— mark (L.S.)
ATTAKALLAKULLA'S mark —— (L.S.) AMOYTORY'S mark —— (L.S.)
HILLAGUNSTE CHOTI'S mark —— (L.S.) CHISCO TALORIES mark —— (L.S.)
THYAGURSTO CUSTENETTAS (L.S.) CLOKOWCTASS'S mark —— (L.S.)



Illegible (L.S.)

By Command of their

JAMES WRIGHT.
Excellencies. ARTHUR DOBBS Esquires
THOMAS BOONE.

The Honble FRANCIS FAUQUIER &
JOHN STUART Esqre Superintendant
FENWICK BULL Secretary:

**PLTF. EX. 12**

**TREATY OF NATION FORD**

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TREATY OF 1840

A treaty entered into at the Nation Ford, Catawba, between the Chiefs and Headmen of the Catawba Indians of the one part and the Commissioners appointed under a resolution of the legislature, passed December, 1839, and acting under commissions from His Excellency Patrick Noble, Esq., Governor of the State of South Carolina, of the other part:

Article First. the Chiefs and Headmen of the Catawba Indians, for themselves and the entire nation, hereby agree to cede, sell, transfer, and convey to the State of South Carolina, all their right, title, and interest to their boundary of land lying on both sides of the Catawba River, situated in the Districts of York and Lancaster, and which are represented in a plat of survey of 15 miles square, made by Samuel Wiley and dated the twenty-second day of February, one thousand seven hundred and sixty-four, and now on file in the Office of Secretary of State.

Article Second. The Commissioners on their part engage in behalf of the State to furnish the Catawba Indians with a tract of land of the value of five thousand dollars, three hundred acres of which is to be good arable lands fit for cultivation, to be purchased in Haywood County, North Carolina, or in some other mountainous or thinly populated region, where the said Indians may desire, and if no such tract can be procured to their satisfaction, they shall be entitled to receive the foregoing amount in cash from the State.

Article Third. The Commissioners further engage that the State shall pay the said Catawba Indians two thou-



sand five hundred dollars at or immediately after the time of their removal and fifteen hundred dollars each year thereafter, for the space of nine years. In Witness Whereof the contracting parties have hereunto set their hands and affixed their seals this 13th day of March, Anno Domini one thousand eight hundred and forty, and in the sixty-fourth year of American independence.

JOHN SPRINGS (L.S.), D. HUTCHISON (L.S.), E. AVERY (L.S.), B. S. MASSEY (L.S.), ALLEN MORROW (L.S.), JAMES KEGG, GEN. (L.S.), (his X mark), DAVID HARRIS, COL. (L.S.) (his X mark), JOHN JOE, MAJOR (L.S.) (his X mark), WM. GEORGE, CAPT. (L.S.) (his X mark), PHILIP KEGG, LIEUT. (L.S.) (his X mark), J. D. P. CURRENCE for SAM SCOTT, SAML. SCOTT, COL. (L.S.) (his X mark), H. T. MASSEY for ALLEN HARRIS, ALLEN HARRIS, LIEUT. (L.S.).

**PLTF. EX. 50**

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
Washington

MEMORANDUM for the Commissioner of Indian Affairs.

You have informally communicated to me a draft for a Memorandum of Understanding between the State of South Carolina, the Catawba Tribe, the Office of Indian Affairs of the United States Department of the Interior, and the Farm Security Administration of the United States Department of Agriculture. The matter would appear to be of sufficient importance to require a formal expression of opinion on my part.

It is my understanding that this Memorandum of Understanding merely constitutes a general declaration of intention on the part of the Indians and the three agencies which are to cooperate in this program. This Memorandum is then to be implemented by such formal contracts as may be necessary to carry into full effect the understanding of the parties.

In spite of the informal nature of this Memorandum it is important to consider the authority of the Office of Indian Affairs to enter into such an agreement as the one here proposed. The agreement provides in effect for a cooperative venture of the four parties concerned in order to bring relief to the remainder of the Catawba Tribe in South Carolina.

By the treaty of 1840 between the Catawbas and the State of South Carolina, the State took charge of this tribe and has since made considerable expenditure on behalf of the tribe. The Federal Government did not take jurisdiction over these Indians until the fiscal year 1941, when the Interior Department Appropriation Act ap-



propriated $7,500 for the relief of the Catawba Indians. This amount was included in the $2,884,520 appropriated in that bill for the general support of Indians and administration of Indian property. (See Conference Report to accompany H.R. 8745, page 6.) While thus no special act of Congress was passed expressly granting to the Department of the Interior jurisdiction over the Catawbas, the special appropriation made for them in the 1941 Appropriation Act implies the grant of such jurisdiction for the purposes for which these funds were appropriated. This intention came out clearly in the hearings before the Senate subcommittee when first an appropriation for the Catawbas was discussed, which at that time was figured at $15,000. During the course of those hearings on H.R. 8745 (76th Cong., 3d session, page 467), Senator Hayden stated as follows:

> "* * * Then all we would have to do, as a practical matter, would be to increase the sum of $2,846,000 by $15,000 and indicate in the report that it was intended for the Catawba Tribe of Indians, and you would do all the rest?
>
> "Mr. Zimmerman: 'I think that would be correct, Senator.'"

This appropriation was in effect expended for relief among the Catawba Indians and similar funds appropriated since are currently being expended for the same purposes. If it is thus established that this Department is authorized to take jurisdiction over the Catawba Indians and has indeed done so, there would clearly be no objection to its entering into an agreement with the State of South Carolina in pursuance of the Johnson-O'Malley Act in order to assure the State's cooperation in promoting the welfare of these Indians. That act now contained in 25 U.S.C. sec. 452-455 authorizes the Secretary of the Interior to expend under such contracts "moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social wel-

fare, including relief of distress, of Indians' residing in the State with which such a contract for joint relief efforts is made. While thus it will be necessary that the formal contract to be executed later be signed by the Secretary of the Interior rather than the Commissioner of Indian Affairs, it will be sufficient for the purposes of the instant Memorandum if it is signed by the Commissioner and approved by the Secretary.

It is true that this agreement is not merely one between this Department and the State, but that there are two other parties, the Indians themselves, to be incorporated under State law, and the Farm Security Administration, a Federal agency. Nothing in the Johnson-O'Malley Act would appear to prevent the addition of such other parties to the agreement. As a matter of fact, private corporations are one of the agencies enumerated in section 452 with which contracts under the Johnson-O'Malley Act may be made by the Department. As to the inclusion of another Federal agency in this venture, the additional help provided by it serves only to strengthen the desirability of the agreement and to increase the effectiveness of the arrangements contemplated by the Johnson-O'Malley Act.

In order to permit this agreement to be entered into on the part of the State of South Carolina, the State Legislature inserted a provision in section 5 of its Deficiency Appropriation Act of 1941, which set up a committee consisting of two appointees of the Governor, two members of the Senate, and two members of the House of Representatives. This committee was authorized "to negotiate and enter into a contract with the Federal Government for the purpose of bettering the condition of the Catawba Indian Tribe in South Carolina." For that purpose the committee was authorized to obligate the State to an extent of $75,000. The agreement is to be signed by the Governor and the members of this committee. This would appear to constitute sufficient authority for the State to enter into this agreement.



In view of the informal character of the Memorandum the signature of the members of the existing business council of the Catawba Indians would be sufficient. Formal contracts as required may, of course, be entered into after the Indians have incorporated under the laws of the State of South Carolina.

While there is in principle no legal objection to the form and substance of the Memorandum, I have made certain changes in its language especially in order to emphasize its informal character by pointing out that the various obligations enumerated in the Memorandum express merely the intention of the parties rather than a final binding agreement.

It is further noted that on page 2 under No. 2(a) of the intended obligations of the State of South Carolina, the State promises to recommend to its next convening general assembly an appropriation for the fiscal year 1942-1943 for the Catawbas of not less than $9,500 with the proviso to the effect that "the Catawba Indian association agrees that no requests will be made for such an appropriation in the future." Such a proviso would seem to be unnecessary and unjustified in that the Catawba Indians neither can, nor should, be deprived of their right to petition the legislature of their State for appropriations needed for their subsistence. This proviso has therefore been eliminated.

It is further noted that the requirement included in the original draft submitted on October 9 to the effect that the Catawba Indians promised "to execute, in favor of the State of South Carolina, a release and quitclaim of all claims and actions, of whatsoever nature, against the State of South Carolina" (p. 5, No. 3) has been eliminated from the present draft. This elimination is most desirable in that it avoids a procedure of doubtful legality which would have consisted in using a contract under the Johnson-O'Malley Act in order to deprive the

Indian tribe of claims which it might be able to enforce in the courts.

Finally your attention is drawn to the obligations of the Farm Security Administration which on page 6 of the draft is "to assume the entire responsibility for management, operations, and supervision of the (Catawba Indian) Association." While it is clear that the Farm Security Administration can and should take complete charge of the rehabilitation program to be initiated by this agreement, it cannot take charge of the association itself, if that association is to be a bona fide corporation under the laws of the State of South Carolina. I have therefore substituted for the last word of the language just quoted, "Association," the words "program initiated by this Memorandum of Understanding."

/s/ Nathan R. Margold
Solicitor.



**PLTF. EX. 52**

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MEMORANDUM OF UNDERSTANDING

Between

THE STATE OF SOUTH CAROLINA, THE CATAWBA INDIAN TRIBE, AND THE OFFICE OF INDIAN AFFAIRS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

THIS MEMORANDUM OF UNDERSTANDING, between the State of South Carolina, acting by and through the Committee created in the Deficiency Appropriation Act of 1943, approved April 17, 1943, the Catawba Indian Tribe in South Carolina, acting by and through its business committee, and the Office of Indian Affairs of the United States Department of the Interior,

WITNESSETH:

WHEREAS, it is to the mutual benefit of the State of South Carolina and of the Catawba Indians in York County, South Carolina, that the Catawba Indians be rehabilitated upon a self-sustaining basis, and accorded equal treatment with other citizens, without discrimination; and

WHEREAS, the State of South Carolina has requested the cooperation of the Office of Indian Affairs in the rehabilitation of the Catawba Indians; and

WHEREAS, the Office of Indian Affairs, with the financial and technical aid of the State of South Carolina, is desirous of rehabilitating said Catawba Indians, and in furtherance of such purpose, to aid them in conducting non-profit activities and other social, educational and welfare activities;

NOW, THEREFORE, the parties to this Memorandum of Understanding do hereby agree to supply the following aid and assistance for the purpose of promoting the rehabilitation of the said Indians:

## THE STATE OF SOUTH CAROLINA

The State of South Carolina by its signatories hereto, agrees:

(1) To contribute for the welfare of the Catawba Indians the sum of $75,000 for these purposes:

(a) To purchase therewith for use of the Catawba Indians such lands as may be agreed upon by the State of South Carolina and the Office of Indian Affairs, title to such lands to be in the State of South Carolina for the Catawba Indians and the lands to remain exempt from taxation; any necessary fees incident to the purchase of said lands shall be considered as a part of the cost of the lands.

(b) The remainder of the $75,000 not needed for the purchase of lands, to be made available to the Federal Government for expenditure through the Office of Indian Affairs to carry out the purposes of this Understanding.

(2) To convey the lands and improvements thereon and appurtenances thereunto belonging, now within the boundary lines of the present Catawba Indian Reservation, formerly set aside by the State of South Carolina, together with such lands and improvements as may be acquired pursuant to (1) (a) hereto, to the United States in trust for the Catawba Indians whenever the Secretary of the Interior shall determine that such transfer is desirable and it



appears that the United States is legally authorized to accept title to such lands in trust for the Catawba Indians.

(3) To recommend to its next convening General Assembly the passage of appropriate legislation for the following purposes:

(a) Beginning with the fiscal year 1944 and for at least two years thereafter, an annual appropriation of $9,500 to be used as directed by the Office of Indian Affairs to aid in rehabilitating the said Indians;

(b) To insure to the members of the Catawba Indian Tribe all the rights and privileges of any other citizen of the State of South Carolina without discrimination.

(4) The State of South Carolina will admit members of the Catawba Indian Tribe into its public schools, including secondary schools, high schools, vocational schools, and State institutions of higher learning, on the same terms as other citizens of the State of South Carolina.

## THE CATAWBA INDIANS

The Catawba Indians agree to organize on the basis of recommendations of the Office of Indian Affairs for the effective transaction of community business, to carry on the program of rehabilitation recommended by the said Office of Indian Affairs, to accept and receive financial aid from any source, and to expend such moneys in any way agreed upon from time to time by the said organization and the Office of Indian Affairs for the welfare of the Catawba Indians. The said organization will be the sole agency through which the Catawba Indians will deal with the other parties to this Memorandum of Understanding, unless and until some other agency is created pursuant to applicable law.

## OFFICE OF INDIAN AFFAIRS

The Office of Indian Affairs of the United States Department of the Interior agrees, subject to the availability of funds as appropriated by the Congress of the United States:

(1) To contribute annually for the welfare of the Catawba Indians, pursuant to the terms of the Johnson-O'Malley Act, such sums as are made available for this purpose;

(2) To delegate members of its staff from time to time, as may be needed, to assist the Catawba Indians in the development of Indian arts and crafts and in the development of markets therefor;

(3) To assist the other parties to this Understanding in developing the educational program for the Catawba Indians;

(4) To make medical examinations of all members of the Catawba Indian Tribe, as soon as personnel is available and, whenever possible, to hospitalize tubercular cases, psychiatric cases and other cases of illness, in an Indian Service Sanatorium or in some other available hospital;

(5) To make loans and grants for the economic development of the Catawba Indians, in accordance with the policies and procedures of the Office of Indian Affairs.



IN WITNESS WHEREOF the parties have hereunto set their hands and seals this 3 day of November, 1943.

STATE OF SOUTH CAROLINA

By /s/ Illegible
By /s/ Joe H. Hall
By /s/ W.R. Bradford
By /s/ Illegible
By /s/ Illegible
By /s/ Illegible
State Committee on Catawba Indians

THE CATAWBA INDIANS

By /s/ Albert Sanders
By /s/ Raymond Harris
By /s/ Roy Brown
Business Committee

OFFICE OF INDIAN AFFAIRS

By /s/ Illegible

Approved: Dec. 14, 1943

/s/ Illegible
Secretary of the Interior

**PLTF. EX. 55**

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C.

January 26, 1959

Mr. H. Rex Lee
Legislative Associate Commissioner
Bureau of Indian Affairs
Washington 25, D.C.

Dear Mr. Lee:

I have received a Resolution adopted by the Catawba General Council, Catawba Indian Tribe, Rock Hill, South Carolina, on January 3, 1959. A copy of this Resolution has been forwarded to your department.

I, therefore, request drafting service for the purpose of preparing for introduction legislation to accomplish the desires set forth in the Resolution. I believe it will be of great benefit to the tribe, both individually and collectively, and a benefit to the United States.

With kindest regards

Sincerely yours,

/s/ Robert W. Hemphill
ROBERT W. HEMPHILL

RWH:d



**ADDENDUM TO PLAINTIFF'S (RESPONDENT'S) REPLY BRIEF IN THE COURT OF APPEALS**

*April 11, 1944.*

*Memorandum for*
*Assistant Secretary Chapman:*

The attached letter which Commissioner Collier recommends that you sign would authorize the Catawba Indian tribe of South Carolina to organize and adopt a constitution under the act of June 18, 1934. I concur in this recommendation.

I am somewhat disturbed by a statement in Commissioner Collier's letter of transmittal. He states that "The Federal Government has not considered these Indians as Federal wards." If by this statement the Commissioner implies that the Catawba tribe has not been recognized by the Federal Government, I must disagree. Indeed if such were the case, the tribe could not now take advantage of the act of June 18, 1934. I find, however, that the tribe has received Federal recognition. The problem can be broken down into two questions. In the first place, is there a political organization which can properly be characterized as a tribe in the commonly accepted meaning of that term? In the second place, has there been Federal recognition of tribal existence? The files are full of evidence which is conclusive that a tribal organization has been continuously maintained by these Indians over a long period of time. The Indians have done business as a tribe and the relationship between the tribal organization and its members conforms to the usual tribal pattern. There can be no doubt that the Catawba Indians now exist as a tribe and have had a known tribal existence for almost a century.

The Congress has recognized the existence of the Catawba Indian Tribe in two enactments, the act of July 29, 1848 (9 Stat. 252, 264), and the act of July 31, 1854 (10 Stat. 315, 316). These acts appropriated funds for

the removal of these Indians west of the Mississippi River, apparently for settlement among the Choctaw and Chickasaw tribes in the Indian Territory. The monies thus appropriated were never used. Had the plan been carried out, it might well have been that the Catawba Indians would have lost their identity as a tribe by becoming adopted or amalgamated with other tribes. As it turned out, however, they did not lose their identity and have retained their tribal organization ever since. It is to be observed that the act of July 29, 1848, makes specific reference to the Catawba *Tribe* of Indians. And although the act of July 31, 1854, referred only to the "Catawba Indians," it seems that at that time it was a practice of legislative draftsmen to refer to almost all tribes in such terms, a practice which is occasionally followed to this day.

I am persuaded, therefore, that the Catawba Indian Tribe exists, as such, and that it has received recognition by the Federal Government. The Catawba Indians are therefore entitled to vote on the constitution which would be submitted to them by the attached letter of transmittal.

FOWLER HARPER,
*Solicitor.*



**DEF. EX. 3**

[H.R. Con. Res. 108, 83d Cong., 1st Sess.,
67 Stat. B132 (1953)]

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CONCURRENT RESOLUTIONS

AUG. 1, 1953

INDIANS

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it

*Resolved by the House of Representatives (the Senate concurring)*, That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potowatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota. It is further declared to be the sense of

Congress that, upon the release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs in the States of California, Florida, New York, and Texas and all other offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as in his judgment, may be necessary to accomplish the purposes of this resolution.

Passed August 1, 1953.



**DEF. EX. 4**

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Union Calendar No. 790

HOUSE OF REPRESENTATIVES

82D CONGRESS
*2d Session*

REPORT
No. 2503

# REPORT WITH RESPECT TO THE HOUSE RESOLUTION AUTHORIZING THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS TO CONDUCT AN INVESTIGATION OF THE BUREAU OF INDIAN AFFAIRS

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DECEMBER 15, 1952.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed with illustrations

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Mr. MURDOCK, from the Committee on Interior and Insular Affairs, submitted the following

## REPORT

[Pursuant to H. Res. 698, 82d Cong.]

### 1. TEXT OF THE RESOLUTION

House Resolution 698 which passed the House on July 1, 1952, provides as follows:

### RESOLUTION

*Resolved*, That the Committee on Interior and Insular Affairs, acting as a whole or by subcommittee, is authorized and directed to conduct a full and complete investigation and study of the activities and operations of the

Bureau of Indian Affairs, with particular reference to (1) the manner in which the Bureau of Indian Affairs has performed its functions of studying the various tribes, bands, and groups of Indians to determine their qualifications for management of their own affairs without further supervision of the Federal Government; (2) the manner in which the Bureau of Indian Affairs has fulfilled its obligations of trust as the agency of the Federal Government charged with the guardianship of Indian property; (3) the adequacy of law and regulations to assure the faithful performance of trust in the exchange, lease, or sale of surface or subsurface interests in or title to real property or disposition of personal property of Indian wards.

The committee shall report to the House (or to the Clerk of the House if the House is not in session) as soon as practicable during the present Congress the results of its investigation and study, together with such recommendations as it deems advisable, including (1) a list of the tribes, bands, or groups of Indians found to be qualified for full management of their own affairs; (2) legislative proposals designed to promote the earliest practicable termination of all Federal supervision and control over Indians; (3) a listing of functions now carried on by the Bureau of Indian Affairs which may be discontinued or transferred to other agencies of the Federal Government or to the States; (4) names of States where further operation of the Bureau of Indian Affairs should be discontinued; (5) recommended legislation for removal of legal disability of Indians by reason of guardianship by the Federal Government; (6) findings concerning transactions involving the exchange, lease, or sale of lands or interests in lands belonging to Indian wards, with specific findings as to such transactions in the State of Oregon; (7) recommendations to the Attorney General for action by the Department of Justice if the committee finds any violation of trust in the disposition of property of Indian wards, (8) recommended legislation designed



to achieve faithful performance by the Bureau of Indian Affairs of the obligations of guardianship for the benefit of Indian wards.

For the purpose of carrying out this resolution, the committee or subcommittee is authorized to sit and act during the present Congress at such times and places within the United States, its Territories, and possessions, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any other member of the committee designated by him, and may be served by any person designated by such chairman or member.

## 2. LETTER OF THE SUBCOMMITTEE CHAIRMAN TO THE COMMISSIONER

The House failed to provide specific funds for the requested investigation.

Soon after the passage of the resolution the chairman of the Committee on Interior and Insular Affairs appointed a special subcommittee to make the requested study and investigation and report thereon.

The members so appointed are as follows: Toby Morris, chairman; Reva Beck Bosone, Wayne N. Aspinall, Wesley A. D'Ewart, and Frank T. Bow.

Since the resolution primarily called for a study and investigation of the activities of the Bureau of Indian Affairs, it was deemed advisable by the special subcommittee to initiate the investigation by requesting the Bureau to submit to the committee in detail information regarding the matters contained in the resolution. A letter was therefore written by the chairman to the Commis-

sioner, Bureau of Indian Affairs, asking for a complete report with respect to the following propositions:

(1) The manner in which the Bureau of Indian Affairs has performed its functions of studying the various tribes, bands, and groups of Indians to determine their qualifications for management of their own affairs without further supervision of the Federal Government;

(2) The manner in which the Bureau of Indian Affair has fulfilled its obligations of trust as the agency of the Federal Government charged with the guardianship of Indian property;

(3) The adequacy of law and regulations as assure the faithful performance of trust in the exchange, lease, or sale of surface or subsurface interests in or title to real property or disposition of personal property of Indian wards;

(4) Name of tribes, bands, or groups of Indians now qualified for full management of their own affairs;

(5) The legislative proposals designed to promote the earliest practicable termination of all Federal supervision and control over Indians;

(6) The functions now carried on by the Bureau of Indian Affairs which may be discontinued or transferred to other agencies of the Federal Government or to the States;

(7) Names of States where further operation of the Bureau of Indian Affairs should be discontinued;

(8) Recommended legislation for removal of legal disability of Indians by reason of guardianship by the Federal Government; and

(9) Findings concerning transactions involving the exchange, lease, or sale of lands or interests in



lands belonging to Indian wards, with specific findings as to such transactions in the State of Oregon.

## 3. TEXT OF QUESTIONNAIRE SENT TO ALL BUREAU OFFICIALS

The request of the committee resulted in the Bureau's sending out to all of its Bureau officials a letter accompanied by a detailed questionnaire, which documents are as follow:

DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
*Washington D. C., August 6, 1952.*

### MEMORANDUM

To: All Bureau officials.

From: Commissioner, Bureau of Indian Affairs.

Subject: Withdrawal programing.

During the past fiscal year the Bureau has devoted a great deal of effort to the development of withdrawal concepts and policy. Bureau personnel have been encouraged to give increasing emphasis to withdrawal objectives in their work with Indian groups and individuals in program development and effectuation. At the central office, we have established the Division of Program, whose primary responsibilities are to render guidance and assistance to Bureau personnel engaged in withdrawal programing at area and agency levels and to formulate Bureau withdrawal programs in cooperation with other central-office staff at national levels. We have reached the stage where it has become desirable to crystallize certain Bureau withdrawal policies, establish methods basic to the development of withdrawal programing, and fix responsibilities for proceeding with the task.

At this point, I want to emphasize that withdrawal program formulation and effectuation is to be a coopera-

tive effort of Indian leaders and community groups affected, side by side, with Bureau personnel. We must lend every encouragement to Indian initiative and leadership. I realize that it will not be possible always to obtain Indian cooperation. However, I want our efforts to obtain such cooperation to be unceasing. In addition to the importance of consultation with Indians, I wish also to stress Indian participation with respect to negotiations with States, political subdivisions of States, and Federal agencies, where such negotiations relate to Bureau withdrawal.

I think it may be fairly said that current congressional actions with regard to the Bureau of Indian Affairs and Indian appropriations indicate future appropriations will be limited largely to financing items which will facilitate withdrawal. This approach is already evident in both House and Senate with respect to appropriation of construction funds. Under this condition it is imperative that the Bureau develop and implement programs to assist Indians to become better qualified to manage their own affairs. Full understanding by the tribal membership should be attained in any event, and agreement with the affected Indian groups must be attained if possible. In the absence of such agreement, however, I want our differences to be clearly defined and understood by both the Indians and ourselves. We must proceed, even though Indian cooperation may be lacking in certain cases.

I look to area and agency personnel, as the representatives of the Bureau of Indian Affairs, to assume primary responsibility for instituting and carrying on cooperative withdrawal programing work at field levels. It is in the field that we have the basic sources of necessary information and the means of enlisting Indian support and participation. In your work with Indian groups I want you to use every opportunity to place before the Indian tribal membership the need for and advantages to be derived from cooperative withdrawal programing effort. Tribal leaders should be encouraged to obtain maximum membership participation in this work.



## FIRST GENERAL WITHDRAWAL PROGRAMING ASSIGNMENT

As the first major step in carrying out the Bureau's share of the above-mentioned responsibilities for formulation and effectuation of withdrawal programs, I am requesting the preparation of certain documents. These documents encompass a compilation of basic facts bearing on withdrawal programing for each tribe, band, identifiable group, or geographical area; a report on withdrawal-program accomplishment, present status, and future plans; a delineation of tasks yet to be completed in order to effect complete withdrawal; and a listing of tribes, bands, etc., found to be qualified for management of their own affairs. These documents will serve a number of very important purposes, including the following: provide a working tool in withdrawal programing; provide a source of information to all interested parties, particularly congressional committees, with respect to Indian and Bureau affairs; provide a ready reference on withdrawal accomplishment to date; and serve as a basis for development of a system of periodic reporting of future withdrawal-program status and accomplishment.

Area directors and superintendents have primary Bureau responsibility for preparation of these documents. The central-office staff function is primarily one of furnishing guidance and consultative services to the field. Area directors will be advised in the near future by the Division of Program as to plans for early field visits by Division representatives.

Final field drafts of documents must be completed in the field and transmitted to the central office not later than September 15, 1952.

The documents to be prepared and procedures to be followed are as follows:

1. Area and agency staffs will assemble all available factual data pertinent to an appraisal of withdrawal potential of each tribe, band, identifiable group, or appropriate geographical area.

*Suggested references*

(*a*) Compilation of Material Relating to the Indians of the United States and the Territory of Alaska, Including Certain Laws and Treaties Affecting Such Indians (Subcommittee on Public Lands, House of Representatives. H. R. 66, 81st Cong., 2d sess., serial No. 30, June 13, 1950).

(*b*) Statistical Charts Regarding the Indians of the United States (undated, Subcommittee on Indian Affairs of House Committee on Interior and Insular Affairs).

(*c*) Material recently submitted by area offices to House Committee on Interior and Insular Affairs for revision of (*b*), above.

(*d*) Any area and agency reports containing data pertinent to withdrawal.

(*e*) Such other records as may be necessary to provide the data required.

2. Area and agency offices will prepare the following documents for each tribe, band, identifiable group, or appropriate geographical area, calling on the Division of Program staff for guidance and consultation which will be provided to the extent that staff may be available.

A. Document: Summary of facts pertinent to withdrawal, using the attached checklist and guide (including Item 1 through Item 28).

B. Document: A summary of accomplishment in withdrawal by termination or transfer of Bureau services to other auspices, in terms of actual withdrawal; also, a description of uncompleted withdrawal negotiations instituted with Indians, States, political subdivisions of States,



political subdivisions of States, etc., and a definition of the current status of such negotiations. (See Document B form, attached.)

C. Document: A listing and description of tasks remaining to be done to effect complete withdrawal of Bureau services by termination or transfer to other auspices, delineating obstacles preventing or impeding withdrawal, recommending procedures to overcome the obstacles and effect complete withdrawal, and designating those procedures to be given top priority in staff attention. (See Document C form, attached.)

D. Document: List those tribes, bands, identifiable groups, and appropriate geographical areas which, in the opinion of the field, are ready for complete withdrawal of Bureau responsibility for services and termination of trusteeship responsibilities, assuming that these responsibilities and services will be transferred to the Indians themselves, local or State governments or other auspices, indicating those tribes, bands, etc., assigned top priority for further staff attention.

3. Upon submittal of these documents to the central office, the Division of Program will consolidate them for all tribes, bands, groups, and geographical areas.

Urgency in completion of this assignment is indicated by the date of September 15, 1952, fixed for submission of final field drafts of documents.

D S Myer, Commissioner

## GENERAL INSTRUCTIONS FOR PREPARATION OF DOCUMENTS A, B, C, AND D

### GENERAL INSTRUCTIONS

1. Data shall be submitted separately for each tribe, band, identifiable group, or geographical area. In determining which of the four units is to be used in presentation of data called for in Documents A, B, C, and D,

the field will make a determination as to which unit is the most suitable for withdrawal programing purposes. In cases where withdrawal programing as to certain functions will be on the basis of a smaller unit and withdrawal programing as to certain other functions will be on the basis of a larger unit, use the smaller unit. A reservation will quite often be the most appropriate unit even though two or more tribes or bands may be located on such reservation.

*Examples*

Example 1: California will be reported as a unit because withdrawal programing is being carried on for the State as a whole.

Example 2: Assume for reservation X:

(*a*) Residents:

1. Two tribes are located on the reservation.

2. Segments of two other tribes are located on the reservation.

(*b*) How withdrawal programing will be conducted:

1. Bureau withdrawal as to most functions will be negotiated with residents of the reservation as a unit.

2. Bureau withdrawal as to education and welfare is being developed to be made applicable throughout the State in which reservation X and certain other reservations are located.

*Selection of reporting unit*

(*a*) The State as a unit is rejected because as to certain functions the Bureau will deal only with Indians at reservation X.

(*b*) Reservation X is selected as a reporting unit because withdrawal of certain functions will be worked out



with the tribes and segments of tribes at the reservation as a unit and no single tribe or segment of a tribe will be an important element in development of the withdrawal program. Hence, reservation X is the smallest unit important from the standpoint of withdrawal programing.

2. In narrative sections of documents, be brief, but don't leave out facts important to an understanding of the subject under discussion. Assume that persons using the report will have no prior specific information about the particular tribe, band, etc., under discussion, although such person will have an understanding of the general relationships between the Federal Government and Indians.

SPECIFIC INSTRUCTIONS

1. Submit original and one copy of all documents to central office.

2. Prepare all documents on white paper, 8- by 10½-inch size.

3. Number pages of each document consecutively, starting the page numbering of each document with page 1.

4. Forms have been prepared by the Central Office for tables to be completed as a part of document A; in addition, forms for documents B and C have been prepared. Forms are to be duplicated in the field with exactly the same headings and columnar arrangements specified by the central office.

5. The field will design its own form for document D.

6. Specific instructions have been prepared for document A. These instructions appear on the first sheet of the check list and guide. Specific instructions have been prepared for documents B and C together. They are enclosed as separate sheets. No specific instructions have been prepared for document D.

INSTRUCTIONS FOR PREPARATION OF DOCUMENTS B AND C

GENERAL INSTRUCTION

Reports will cover generally only those functions performed by the Bureau. Functions performed for Indians by themselves or others will not be reported unless the performance is so unsatisfactory as to be an important obstacle to complete withdrawal.

## 7. SUMMARY STATEMENT OF SUBCOMMITTEE PROCEEDINGS

Upon receipt of the foregoing information from the Bureau of Indians Affairs, the committee met in executive session to consider the submitted material and determine further activities in order to fully appraise the House regarding the provisions of House Resolution 698. It was unanimously agreed at such meeting that due to the few remaining days of the Eighty-second Congress, with the resultant lack of time to fully pursue the investigation, that such special committee make a report regarding its activities and recommend further study and investigation by the next Congress. Only by this procedure can the study and investigation of the Bureau of Indian Affairs be satisfactorily completed. To try and complete the study within the remaining few days of the Eighty-second Congress would not permit a fair analysis of all the matters presented. The problem of withdrawing Federal supervision and control over the Indians, as such, is one that has been before the eyes of Congress for over 100 years. The problem is a tremendous one involving a great and worthy people. It deserves real and much concern and consideration.

It is therefore the opinion and recommendation of the committee that the Eighty-third Congress continue this study and investigation toward the goal of fully and properly advising the House with respect to the whole Indian problem, including recommended legislation.



The committee in its deliberation of this matter gave consideration to the material submitted by the Bureau, and in so doing, found certain information with which it could not agree. The committee therefore desires to point out that the information submitted by the Bureau contained in this report is not to be interpreted as any endorsement by the committee of such information or its outlined policies. The committee only includes the information submitted by the Bureau as a part of this report for the specific purpose of furnishing to the next Congress the official position of the Bureau regarding the inquiries as made by the House of Representatives in House Resolution 698. The committee believes that the information submitted herewith will serve the next Congress in the further study of legislative matters relating to Indians.

It is the belief of the committee that all legislation dealing with Indian affairs should be directed to the ending of a segregated race set aside from other citizens. It is the recommended policy of this committee that the Indians be assimilated into the Nation's social and economic life. The objectives, in bringing about the ending of the Indian segregation to which this committee has worked and recommends are: (1) the end of wardship or trust status as not acceptable to our American way of life, and (2) the assumption by individual Indians of all the duties, obligations, and privileges of free citizens. The committee realizes that these objectives cannot be accomplished "overnight," but recommends a constant effort in that direction, with careful and earnest consideration always given to the rights of the Indians.

In the appendix to this report the committee is making available certain information and proposed legislation, to which the committee has given detailed consideration. It is believed that the material included in the appendix will be helpful to the next Congress should it see fit to continue the investigation. The compilation of material included in the appendix is the result of great effort by

the committee and the Library of Congress in getting together in one volume certain basic facts and statistics relating to the Indians of the United States and Alaska. This information has proved helpful to the committee and the demand for same has been so great that the committee print of the compilation has become exhausted.

The legislative proposals included in the appendix are the result of many hearings and field inspections by the committee.

The proposed legislation regarding the Alaska native claims matter resulted from hearings by a special Indian Affairs Subcommittee in Alaska and numerous conferences between the committee, its staff, the Bureau of Indian Affairs, and the Department of Justice. It is urged that consideration be given to this legislation by the next Congress. The proposed legislation in the appendix relating to the Agua Caliente Indians of California is the result of hearings by the Indian Affairs Subcommittee at Palm Springs, Calif. It is likewise recommended that consideration be given such legislation. These matters have been given much but, of course, not complete consideration by the committee.

TOBY MORRIS, *Chairman.*
REVA BECK BOSONE.
WESLEY A. D'EWART.
FRANK T. BOW.
WAYNE N. ASPINALL.



**DEF. EX. 5**

Union Calendar No. 925

83d Congress, 2d Session - - - - - House Report No. 2680

# REPORT

WITH RESPECT TO

## THE HOUSE RESOLUTION AUTHORIZING THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS TO CONDUCT AN INVESTIGATION OF THE BUREAU OF INDIAN AFFAIRS

PURSUANT TO HOUSE RESOLUTION 89
(83D CONGRESS)

[SEAL]

SEPTEMBER 20, 1954.—Committed to the Committee on the Whole House on the State of the Union and ordered to be printed, with an illustration

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LIST OF CHARTS AND MAP





TEXT OF THE RESOLUTION

House Resolution 89, which passed the House on March 25, 1953, provides as follows:

RESOLUTION

*Resolved*, That the Committee on Interior and Insular Affairs, acting as a whole or by subcommittee, is authorized and directed to conduct a full and complete investigation and study of the activities and operations of the Bureau of Indian Affairs with reference to (1) the manner in which the Bureau of Indian Affairs has performed its functions of studying the various tribes, bands, and groups of Indians to determine their qualifications for management of their own affairs without further supervision of the Federal Government; (2) the manner in which the Bureau of Indian Affairs has fulfilled its obligations of trust as the agency of the Federal Government charged with the guardianship of Indian property; (3) the adequacy of law and regulations to assure the faithful performance of trust in the exchange, lease, or sale of surface or subsurface interests in or title to real property or disposition of personal property of Indian wards.

The committee shall report to the House (or to the Clerk of the House if the House is not in session) as soon as practicable during the present Congress the results of its investigation and study, together with such recommendations as it deems advisable, including (1) a list of the tribes, bands, or groups of Indians found to be qualified for full management of their own affairs; (2) legislative proposals designed to promote the earliest practicable termination of all Federal supervision and control over Indians; (3) a listing of functions now carried on by the Bureau of Indian Affairs which may be discontinued or transferred to other agencies of the Federal Government or to the States; (4) names of States where further operation of the Bureau of Indian Affairs should be discontinued; (5) recommended legislation for removal

of legal disability of Indians by reason of guardianship by the Federal Government; (6) findings concerning transactions involving the exchange, lease, or sale of lands or interests in lands belonging to Indian wards.

For the purpose of carrying out this resolution, the committee or subcommittee is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witness and the production of such books, records, correspondence, memoranda, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any other member of the committee designated by him, and may be served by any person designated by such chairman or member.

PREVIOUS COMMITTEE POLICY STATED IN 82D CONGRESS

In its reports (H. Rept. No. 2503) to the House in the 82d Congress the Interior and Insular Affairs Committee made the following statement:

It is the belief of the committee that all legislation dealing with Indian affairs should be directed to the ending of a segregated race set aside from other citizens. It is the recommended policy of this committee that the Indians be assimilated into the Nation's social and economic life. The objectives, in bringing about the ending of the Indian segregation to which this committee has worked and recommends are (1) the end of wardship or trust status as not acceptable to our American way of life, and (2) the assumption by individual Indians of all the duties, obligations, and privileges of free citizens. The committee realizes that these objectives cannot be accomplished overnight, but recommends a constant effort in that direction, with careful and earnest consideration always given to the rights of the Indians.



PRESENT COMMITTEE OUTLINE OF POLICY

House Report No. 841 (83d Cong., 1st sess.) on House Concurrent Resolution 108 stated that current Indian bills had—

two coordinated aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and, second, termination of the subjection of Indians to Federal laws applicable to Indians as such.

The Report 841 then outlined five principles of legislation as follows:

1. Enactment of legislation having as its purpose repeal of existing statutory provisions which set Indians apart from other citizens, thereby abolishing certain restrictions deemed discriminatory * * *.

Under this program Public Laws 277, 280, and 281 were enacted in the first session of the 83d Congress which repealed discriminations in the Federal statutes regarding use or possession by, or sale and disposition of, intoxicants to Indians; conferred State civil and criminal jurisdiction over certain Indians making possible a similar extension to the remainder; and repealed Federal Statutes on Indians having to do with personal property and sale of firearms.

2. Enactment of legislation terminating certain services provided by the Indian Bureau for Indians by transferring responsibility for such services to other governmental or private agencies. * * *

For the securement of ends envisaged in this program, a bill (H.R. 303) was introduced to transfer the administration of Indian health and hospital facilities to the Federal Department of Health, Education, and Welfare. More remains to be accomplished in this program.

3. Enactment of legislation providing for withdrawal of individual Indians from Federal responsibility, at the

same time removing such individuals from restrictions and disabilities applicable to Indians only.

For the purpose of accomplishing this end, H.R. 4985 was introduced to provide a procedure for the issuance of a certificate or degree of competency to any competent adult Indian making application.

4. Enactment of legislation terminating Federal responsibility for administering the affairs of Indian tribes within individual States as rapidly as local circumstances will permit. * * *

House Concurrent Resolution 108 named the States of California, Florida, New York, and Texas as those within which Indian tribes and individuals should be freed from Federal supervision and control. In the second session of the 83d Congress, H.R. 8322 provided for termination of Indian Bureau supervision in California, H.R. 7321 for termination in Florida, H.R. 7679 and H.R. 7680 for termination in New York and H.R. 6282 for termination in Texas.

5. Enactment of legislation terminating Federal responsibility for administering the affairs of individual Indian tribes as rapidly as circumstances will permit. * * *

House Concurrent Resolution 108 named the Flathead of Montana, Klamath of Oregon, Menominee of Wisconsin, Potawatomi of Kansas and Nebraska, and the Turtle Mountain Band of Chippewa in North Dakota as tribes to be freed from Federal supervision and control at the earliest possible moment.

TEXT OF HOUSE CONCURRENT RESOLUTION 108

[H. Con. Res. 108]

CONCURRENT RESOLUTION

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of



the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it

*Resolved by the House of Representatives (the Senate concurring)*, That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following-named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from the disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potawatomi Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are one the Turtle Mountain Reservation, North Dakota. It is further declared to be the sense of Congress that, upon the release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs in the State of California, Florida, New York, and Texas, and all other offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution.

HEARINGS UNDER HOUSE CONCURRENT RESOLUTION 108

H.R. 7319 provides for termination at Flathead, H.R. 7320 for termination at Klamath, H.R. 7135 for termination at Menominee, H.R. 7318 for termination of Sac and Fox et al (including Potawatomi of Kansas), and H.R. 7316 for termination at Turtle Mountain. In addition, a bill to terminate Federal supervision over certain groups in Utah, H.R. 7674, has been introduced. Hearings have been held jointly with the Senate committee on all of the above-mentioned bills.

The hearings on termination bills held with the Senate committee were as follows:

(1) February 15, 1954; Tribes of Utah (Shivwits, Kanosh, Koosharem, and Indian Peaks Bands of Paiute, Skull Valley Shoshone, and Washakle Shoshone); H.R. 7654 and S. 2670.

(2) February 16, 1954; Alabama and Coushatta Tribes of Texas; H.R. 6282 and H.R. 6547 and S.2744.

(3) February 17, 1954; Tribes of Western Oregon (Grande Ronde, Siletz); H.R. 7317 and S.2746.

(4) February 18-19, 1954; Kansas and Nebraska, tribes (Sac and Fox, Iowa, Potawatomi, Kickapoo); H.R. 7318, S. 2743.

(5) February 23-24, 1954; Klamath of Oregon; H.R. 7320 and S. 2745.

(6) February 24, 1954; Makah of Washington; H.R. 7981.

(7) February 25-26, 1954; Flathead of Montana (Salish and Kootenai); H.R. 7319 and S. 2750.

(8) March 1-2, 1954; Seminole of Florida; H.R. 7321 and S. 2717.

(A field visit was made to Florida Everglades and Seminole homes by Congressmen E. Y. Berry and James A. Haley of the committee, March 11-14, 1954.)



(9) March 2-3, 1954; Turtle Mountain Chippewa of North Dakota; H.R. 7316 and S. 2748.

(10) March 4, 5, 6, 1954; Indians of California; H.R. 7322 and S. 2749.

(11) March 10, 11, 12, 1954; Menominee of Wisconsin; H.R. 7135 and S. 2813.

(12) Field hearings at Reno, Nev., April 16-17, 1954; Nevada Indians (Ruby Valley Shoshone, Yerington Paiute, Battle Mountain, Carson, Las Vegas, Lovelock, Reno-Sparks, and Yerington Colonies); H.R. 7552.

(13) Field hearings at Klamath Falls, Oreg., April 19, 1954; Klamath Indians; H.R. 7320 and S. 2745.

INVESTIGATIONS UNDER HOUSE RESOLUTION 89

The efforts of the committee to fulfill its charge under House Resolution 89 took the form of (*a*) several questionnaires submitted to the various officials of the Indian Bureau by mail, and (*b*) field hearings at eight points during July, September, and October of 1953.

The results of the questionnaires are summarized in the appendixes to this report. The hearings under House Resolution 89 were as follows:

(1) Sheridan, Wyoming; July 18 and 19, 1953, Hon. William Henry Harrison of Wyoming, presiding and representatives of 24 tribes being present. This hearing is reported in Committee Print No. 11, 83d Congress, 1st session.

(2) Eugene, Oreg.; September 24, 1953, Hon. A. L. Miller, chairman of the full committee presiding and representatives of the Portland area office of the Indian Bureau, and the following tribal groups represented being present: Klamath, Umatilla, and Warm Springs. Others members of the committee present were Hon. Wesley A. D'Ewart, Hon. Clair Engle, and Hon. George A. Shuford.

(3) Everett, Wash.; September 25, 1953, Hon. A. L. Miller, chairman of the full committee presiding and representatives of the Western Washington Agency of the Indian Bureau, and the following tribal groups represented: Tulalip, Makah, Quinault, Lummi, Swinomish, Yakima, Quillayute, and Nooksack. Other members of the committee present were Hon. Wesley A. D'Ewart, Hon. Jack Westland, Hon. Clair Engle, Hon. George A. Shuford, and Hon. William A. Dawson.

(4) Rosebud Indian Agency, S. Dak.; October 10, 1953, Hon. William H. Harrison presiding and representatives of the Rosebud Sioux Indians present. Other members of the committee present were Hon. Wayne N. Aspinall and Hon. E. Y. Berry.

(5) Pine Ridge Indian Agency, S. Dak.; October 11, 1953, Hon. William H. Harrison presiding and representatives of the Oglala Sioux Tribe present. Other members of the committee present were Hon. Wayne N. Aspinall and Hon. E. Y. Berry.

(6) Browning, Mont.; October 14, 1953, Hon. William H. Harrison presiding and representatives of the Blackfeet Tribe present. Other members of the committee present were Hon. Wesley A. D'Ewart, Hon. Wayne N. Aspinall and Hon. E. Y. Berry.

(7) Dixon, Mont.; October 16, 1953, Hon. William H. Harrison presiding and representatives of the Flathead Tribe present. Other members of the committee were Hon. Wesley A. D'Ewart, Hon. Wayne N. Aspinall and Hon. E. Y. Berry.

(8) Nespelem, Wash.; October 17, 1953, Hon. William H. Harrison presiding and representatives of the Colville Indians present. Other members of the committee present were Hon. Wesley A. D'Ewart, Hon. Wayne N. Aspinall, and Hon. E. Y. Berry.



**DEF. EX. 6**

Union Calendar No. 925

HOUSE OF REPRESENTATIVES

83D CONGRESS *2d Session* — REPORT No. 2680

# REPORT WITH RESPECT TO THE HOUSE RESOLUTION AUTHORIZING THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS TO CONDUCT AN INVESTIGATION OF THE BUREAU OF INDIAN AFFAIRS

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SEPTEMBER 20, 1954.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed, with an illustration

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Mr. MILLER of Nebraska, from the Committee on Interior and Insular Affairs, submitted the following

## REPORT

[Pursuant to H. Res. 89, 83d Cong.]

To assist in complying with the instructions of House Resolution 89, Chairman Miller appointed a Special Subcommittee on Indian Affairs to conduct the proposed study. Representative William Henry Harrison was named chairman and the members were Representatives E. Y. Berry, Jack Westland, Wayne N. Aspinall, and George A. Shuford.

Following is the report to the Committee on Interior and Insular Affairs submitted by the Special Subcommittee on Indian Affairs:

STATEMENT OF DIFFICULTIES

The subcommittee would like to preface its findings under House Resolution 89 with a brief statement regarding the principal difficulties encountered during its investigations. These difficulties can be used, if properly understood, as means of approach toward solving the general question of Indian wardship and dependency.

(1) There exists at present, no adequate channel for the expression of overall Indian public opinion, either in local communities, or in the Nation as a whole. Indians do not publish daily newspapers, do not have adequate polling systems on public issues, and do not express themselves in public as members of an Indian bloc or segment of the general public. Hence, it is impossible for the subcommittee, under the present system, to poll Indian opinion on issues involving themselves.

(2) Indian Affairs suffer from an increasing complexity of technical and geographical detail which is manifested in the mounting accumulation of special legislation relating to specific Indian groups and an infinite amount of detail in each piece of legislation which well-nigh overpowers human capacity to comprehend. The background material needed even in the consideration of particular Indian bills is frequently so vast and involved that neither members nor their staffs have the time or resources to digest it.

(3) Under the authority of the Indian Reorganization Act of 1934 (48 Stat. 984-988 C 576) the Secretary of the Interior has been able to delegate certain powers, originally delegated to him by Congress, to the tribal governments themselves with resulting confusion of authorities and jurisdictions which sometimes passes belief. For example, the tribal constitutions contains membership clauses in which the tribe is empowered to determine membership in accordance with tribal membership rolls, which rolls are apparently no one's responsibility to maintain, judging from actual performance at many Indian agencies. Inasmuch as it is possible for certain elements to manipulate these tribal rolls to suit themselves it is possible to include many persons of little or no Indian blood among the recipients of Indian Bureau services as members of tribes holding lands in trust status.



(4) Apparently no law yet enacted in the field of Indian affairs has had the effect of stimulating Indians, as a group, to make an active effort to end Federal wardship. As a matter of record, it is frequently found that the most active and advanced Indian tribes are the most reluctant to sever the ties which bind them to their Federal guardian. It might be supposed that the Indian Reorganization Act of 1934 would have served to school Indians in the ways of self-government in local community life which would have prepared them to participate in the civic life of their States as do non-Indians. Such, however, was not the case, and committee investigations show that the Indian Reorganization Act served to tighten the bonds more closely which held the reservation ward to his guardian. The record suggests that only through an energetic program to eliminate statutory provisions setting Indian citizens apart from non-Indian citizens in matters relating to personal status can there be hope of attaining for the Indian the benefits and responsibilities enjoyed by non-Indians.

Findings and recommendations by the committee regarding the points raised in House Resolution 89 are as follows:

*(1) A list of the tribes, bands, or groups of Indians found to be qualified for full management of their own affairs,* and

*(4) Names of States where further operation of the Bureau of Indian Affairs should be discontinued*

In order to present a full list of tribes, bands, and groups which were officially determined by the Indian

Bureau to be immediately eligible or ineligible to manage their own affairs, the following table was prepared on the basis of evidence from field agencies submitted by the Indian Bureau in 1953 (i.e., from the Dillon Myer field questionnaire of August 1952). The word "yes" refers to those groups qualified to handle their own affairs immediately and the word "no" to those not so qualified, in the opinion of local officials of the Indian Bureau. (See pp. 25-26, and 29-97, this report.)

Blackfeet: Yes (except for a minority).
California (115 groups listed on pp. 1140-1141 of H. Rept. 2503, 82d Cong., 2d sess.): Yes.
Cherokee and Catawba:
- Cherokee of North Carolina: No.
- Catawba of South Carolina: Yes.

Cheyenne River: No.
Choctaw of Mississippi: No.
Colorado River Agency:
- Hualapai: No.
- Yavapai: Yes (conditionally).
- Havasupai: No.
- Camp Verde: No.
- Fort Mohave: No.
- Cocopah: Yes.
- Colorado River: No.

Colville and Spokane:
- Colville: Yes (conditionally).
- Spokane: Yes.

Consolidated Chippewa:
- Fond du Lac: Yes.
- Grand Portage: Yes (conditionally).
- Leech Lake: Yes (conditionally).
- White Earth: Yes (conditionally).
- Nett Lake: Yes (conditionally).
- Mille Lac: Yes.

Consolidated Ute Agency:
- Southern Ute: No.
- Ute Mountain: No.

Crow: No.
Crow Creek and Lower Brule:
- Crow Creek: No.
- Lower Brule: No.

Five Civilized Tribes: No.
- Quapaw area:
  - Eastern Shawnee: Yes (conditionally).
  - Ottawa: Yes.
  - Quapaw: Yes (except for minority).
  - Seneca-Cayuga: Yes (conditionally).
  - Wyandotte: Yes (conditionally).

Flathead: Yes.
Fort Apache: No.
Fort Belknap and Rocky Boy's:
- Fort Belknap: Yes.
- Rocky Boy's: No.

Fort Berthold: Yes.
Fort Hall: Yes (if gradual).
Fort Peck: Yes (except for minority).
Great Lakes Consolidated:
- Bad River: No.
- Bay Mills: Yes.
- Forest County Potawatomi: No.
- Hannanville: Yes.
- Keweenaw Bay: Yes.
- Lac Courte Oreilles: No.
- Lac du Flambeau: Yes (conditionally).



- Oneida: Yes.
- Red Cliff: Yes.
- Sac and Fox of the Mississippi in Iowa: No.
- Saginaw Chippewa or Isabella: Yes.
- St. Croix: Yes.

Sokaogon or Mole Lake: Yes (conditionally).
- Stockbridge-Munsee: Yes.
- Winnebago of Wisconsin: Yes (conditionally).

Hopi: No.
Jicarilla: No.
Klamath: (?).
Menominee: Yes.
Mescalero Apache: No.
Navaho: No.
Nevada: [1]
- Battle Mountain Colony: Yes.
- Carson County: Yes.
- Duck Valley: Yes.
- Duckwater: Yes.
- Elko: Yes.
- Ely: Yes.
- Fallon Colony: No.
- Fallon: Yes.
- Fort McDermitt: Yes.
- Goshute: No.
- Las Vegas: Yes.
- Lovelock Colony: No.
- Moapa: Yes.
- Pyramid Lake: Yes.
- Reno-Sparks: Yes.
- Ruby Valley: Yes.
- Skull Valley: Yes.
- South Fork: Yes.
- Summit Lake: Yes.
- Walker River: Yes.
- Washoe: No.
- Winnemucca Colony: Yes.
- Yerington Colony: No.
- Yerington (Campbell Ranch): Yes.
- Yomba: Yes.

Northern Cheyenne: No.
Northern Idaho Agency:
- Kalispel: No.
- Kootenai: No.
- Nez Perce: Yes.
- Coeur d'Alene: Yes.

Osage: (?)
Papago: No.
Pima Agency:
- Fort McDowell: No.
- Salt River: Yes (conditionally).
- Gila River: No.
- Maricopa or Ak Chin: No.

Pine Ridge: No.
Pipestone: (?).
Red Lake: No.
Rosebud and Yankton:
- Rosebud: No.
- Yankton: Yes (conditionally).

San Carlos: No.
Seminole of Florida: No.
Sisseton-Wahpeton Sioux: Yes.
Southern Plains:
- Absentee Shawnee: No.
- Alabama-Coushatta of Texas: Yes (except for minority).
- Caddo: Yes.
- Cheyenne-Arapaho: No.
- Citizen Potawatomi: Yes.
- Fort Sill Apache: Yes.
- Iowa of Kansas and Nebraska: Yes.
- Iowa of Oklahoma: Yes.
- Kaw: Yes.
- Kickapoo of Kansas: Yes.
- Kickapoo of Oklahoma: No.
- Kiowa-Comanche-Apache: No.
- Otoc-Missouria: No.
- Pawnee: Yes (except for minority).
- Ponca of Oklahoma: No.

[1] Based on numerical counts of families, competent, marginal, and incompetent.

Prairie Potawatomi of Kansas: No.
Sac and Fox of Kansas and Nebraska: Yes.
Sac and Fox of Oklahoma: Yes (except for minority).
Tonkawa: Yes.
Wichita: Yes (except for minority).
Standing Rock: No.
Turtle Mountain and Fort Totten:
Turtle Mountain: Yes.
Fort Totten: Yes (conditionally).
Uintah and Ouray:
Uintah and Ouray: No.
Shivwits: No.
Koosharem: No.
Indian Peaks: Yes (conditionally).
Kaibab: No.
Kanosh: No.
Umatilla: Yes (conditionally).
United Pueblos:
Acoma: No.
Cochiti: No.
Isleta: No.
Jemez: No.
Laguna: No.
Nambe: No.
Picuris: No.
Pojoaque: No.
Sandia: No.
San Felipe: No.
San Ildefonso: No.
San Juan: No.
Santa Ana: No.
Santa Clara: No.
Santo Domingo: No.
Taos: No.
Tesuque: No.
Zia: No.
Zuni: No.
Canyoncito: No.
Alamo: No.
Ramah: No.
Warm Springs: No.
Western Washington:
Chehalis: Yes.
Hoh: Yes.
Lower Elwha: Yes.
Lummi: Yes (conditionally).
Makah: Yes.
Muckleshoot: Yes.
Nisqually: Yes.
Ozette: Yes.
Port Gamble: Yes.
Port Madison: Yes.
Public Domain: Yes.
Puyallup: Yes.
Quileuto: Yes.
Quinault: Yes.
Shoalwater: Yes.
Skokomish: Yes.
Squaxon Island: Yes.
Swinomish: Yes (conditionally).
Tulalip: Yes.
Wind River: Yes.
Winnebago Agency:
Omaha: Yes.
Ponca: Yes.
Santee Sioux: Yes.
Winnebago: Yes.
Yakima: No.

On the basis of the groups, tribes, bands, etc., named by the local Indian Bureau officials themselves, necessary legislation and administrative steps should be taken to effect discontinuance of further operation of the Bureau of Indians Affairs (either by transfer of responsibility for management and supervision over their lives and property directly to individual Indians or groups, to Federal agencies supplying to non-Indians services needed by some Indians, or to the States and local governmental subdivisions) in the following States: California, Michigan, Nebraska, South Carolina, Texas, and Wyoming. Conclusions reached at the local Bureau level may not, of course, coincide with committee conclusions which might be reached after full hearings nor with local findings that all tribes in all named States are found eligible for termination.



*(3) A listing of functions now carried on by the Bureau of Indian Affairs which may be discontinued or transferred to other agencies of the Federal Government or to the States*

The functions currently performed by the Indian Bureau may be broadly classified under the following headings: (1) "Education"; (2) "Heath"; (3) "Welfare"; (4) "Law and Order"; and (5) "Management of Indian Lands and Resources".

The subcommittee recommends that all remaining educational activities now carried on by the Indian Bureau be transferred as soon as possible to the States. If this can be done through contracts under the Johnson-O'Malley Act (49 Stat. 1458) it should be effectuated within 5 years. If not, then special legislation by Congress may be needed. Contracts under the Johnson-O'Malley Act require the initiative to come from the Indian Bureau at the present time and therefore it is advisable to transfer this function of negotiation to the Federal Department of Health, Education, and Welfare.

In the matter of Indian health, the subcommittee also recommends that this function be transferred to the Federal Department of Health, Education, and Welfare with the understanding that services shall be rendered in former Indian hospitals to all citizens alike, regardless of race. Johnson-O'Malley contracts by the Indian Bureau should be discontinued in the field of health.

Welfare activities of the Indian Bureau could be transferred to the Department of Health, Education, and Welfare, so far as they relate to services performed by the Federal Government for all of its citizens. Otherwise, such services might well be terminated or transferred to local units of government.

Johnson-O'Malley Act contracts for Indian welfare by the Indian Bureau should be discontinued. These have never been important and have no significant value.

Law and order functions of the Indian Bureau can and should be entirely transferred to the States. Public Law 280 of the 83d Congress operated to (1) confer as of enactment date, civil and criminal jurisdiction in California, Minnesota (except Red Lake), all of Nebraska, Oregon (except Warm Springs), and Wisconsin (except Menominee); (2) give consent to Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington, to amend present organic law to permit assumption of jurisdiction; and (3) to give consent to all other States to acquire jurisdiction at such time and in such manner as by affirmative legislative action such States may so elect. Federal-Indian-State cooperation and understanding of the desirable ends to be accomplished remain the key to solution to this historic and multiface problem.

The management of Indian lands and resources includes programs of credit and extension, forest and range management, irrigation, roads, soil conservation, and land sales, rental, or lease. Some of these are functions normally performed by other Federal agencies for all citizens. These could be transferred to such agencies. Others such as roads could be transferred to State or local governments. Indian forests could be treated in accordance with the individual situation. The function of land sales, management, rental, and lease should definitely be transferred to the Indians themselves. A legislative program



of release tribe by tribe would necessarily include provisions for transfer of land and resources management to the proper existing agency. The committee's recommendations regarding the management of Indian lands and resources are set forth under item (6) "Findings concerning transactions involving the exchange, lease, or sale of lands or interest in lands belonging to Indian wards."

*(2) Legislative proposals designed to promote the earliest practicable termination of all Federal supervision and control over Indians, and*

*(5) Recommended legislation for removal of legal disability of Indians by reason of guardianship by the Federal Government*

Since legal disabilities of Indians by reason of guardianship by the Federal Government are part and parcel of special Federal supervision and control over Indians the two are grouped together in this report. In fact, the chief remaining legal disability of Indians under ward status consists in the ineligibility of the Indians to handle their own property as they see fit. The effectuation of a removal of Federal special supervision and control over Indians should include a removal of special legal disabilities appertaining to Indians under guardianship.

The organization of Indians into tribal groups with constitutions and charters derived from the Secretary of the Interior—in numerous instances without affirmative tribal approval or comprehension of what was being undertaken—appears to constitute one of the outstanding legal disabilities of Indians at the present time. The requirement for secretarial approval of tribal attorneys' contracts is an additional disability along the same line. Hence, it is the opinion of this subcommittee, after examination of the record compiled during lengthy investigations, with respect to the operation of such tribal governments, both those organized under the Indian Reorgan-

ization Act (48 Stat. 984) and those otherwise formulated, that there should be immediately initiated a program to evaluate the operations of each individual tribe under existing authority with an objective of repealing such authority where there is a demonstrated unwillingness or inability of an individual group to function in a reasonably satisfactory manner for maximum group, rather than individual, benefits. A firm policy of local Indian responsibility, combined with full consultation at the local level to achieve understanding, it is believed, should permit objective evaluation of the program, encouraging self-determination.

The subcommmittee also takes notice that the so-called Handbook of Federal Indian Law was compiled and published in 1940 and has been employed as a standard reference book on Indian law. The subcommittee has concluded, in view of the great body of statutes, regulations, and court decisions since operative (including those growing out of the Indian Claims Commission Act of 1946), that it is an inadequate and outdated account of Federal-Indian relations; it is therefore recommended that title 25 of the United States Code be specially annotated and printed as a separate fundamental reference on Federal-Indian law and that a detailed index of the subject matter of all congressional legislation relating to individual Indian tribes, to include treaties or other special agreements, be made a part of this document.

The subcommittee recommends that a comprehensive study and report to Congress concerning law enforcement practices on each reservation be made by the Indian Bureau not later than July 1, 1955, with particular emphasis on actual operations, the matter of maintenance and preservation of court records, the receipt and disposition of court fines on reservations, and the history of law enforcement activities since 1934.

The subcommittee furthermore recommends that a study be made of the adequacies of expression of Indian opinion



by organizations actively concerned with legislation to remove Indians from the status of wardship, among others (1) the National Congress of American Indians, (2) the Association on American Indian Affairs, (3) the Institute of Ethnic Affairs, and (4) the Indian Rights Association.

The subcommittee recommends that an appraisal be made of the citizenship status of Indians on the rolls of Colville, Blackfeet, Turtle Mountain, Papago, Kootenai, Fort Peck, Red Lake, Fort Belknap, Consolidated Chippewa, Mescalero Apache, New York Indians, Michigan Indians, and any other reservations located within some proximity of our national borders. It may be desirable to have the names of any of those who are on these tribal rolls but who maintain legal residence and citizenship in either Canada or Mexico and the treaty status of such individuals, if relevant.

The subcommittee recomemnds programing of cadastral surveys looking toward eventual taxation in each State wherein are located Federal Indian reservations. Such surveys are of the greatest importance in making available authentic information regarding ownership, title, extent, and value of Indian lands which may be ultimately added to the local tax rolls. Indian allottees or holders of trust allotments must be effectively familiarized with taxing procedures and tax practices prior to assumption of this responsibility under further congressional legislation.

The subcommittee recommends that at the time of termination of Federal special authority over each Indian tribe, a list of any known legal disabilities, including treaty provisions (if any), for that tribe be compiled and given consideration in terminal legislation. The subcommittee further recommends expediting of the matter of preparing terminal bills to the end that bills may be drawn for all groups mentioned under points (1) and (4) under the category "Yes" within the next 5 years.

It is anticipated that programs for termination for remaining groups will be subsequently formulated with schedules of withdrawal from each, with time limits specified.

*(6) Findings concerning transactions involving the exchange, lease, or sale of lands or interests in lands belonging to Indian wards*

The only permanent solution for the problems involved in the handling of Indian lands by the Bureau of Indian Affairs lies in removal of Indian Bureau control. Hence it is the recommendation of this subcommittee that immediate steps be taken to make possible the handling of all leases of Indian land (belonging to those individuals or groups recommended for early termination) a matter of simple contract directly negotiated between individual Indians or cooperative groups of Indians and the lessees. No further Indian Bureau handling of such matters in the case of competent Indians is desirable or necessary. Individual Indians or cooperative groups of competent Indians should be encouraged to make contracts with general counsel of their own choosing without need of approval from the Secretary of the Interior.

Disposition and leasing of tribal land should be left up to the Indians who have interest therein. Competent Indians should be entitled to buy or sell land as they see fit without restriction. Heirship land should be consolidated or sold and the proceeds distributed among the heirs. Indians should not be subjected to control as to how they are to spend the proceeds of per capita distributions. They will never possess the rights of full citizenship so long as any part of their business activities continues to be handled for them long after they have become really competent.

The subcommittee finds that in the fraud cases involving manipulations of title and underappraisal of land values in the State of Oregon justice has been done and



the Indian Bureau appears to have discharged its obligations of trust as well as it could under the circumstances. The only final solution to prevent future repetition of such cases lies in taking all such land from trust status and granting patent-in-fee to all allotments. Indians now in wardship status would, if granted all the rights and privileges of handling their own property, not be subject to fraud in the manner of the cases mentioned above. They would have the responsibilities of full citizenship which is their due. At present the attitude of the Indian under wardship can be that he is not a morally responsible agent in matters of fraud. In other words, the legal status of incompetency, ipso facto, is bad for the Indian. The sooner he is completely rid of this status, the better.

The subcommittee's findings indicate that the policy of renewing expired trust allotments should cease in the interest of the Indian's becoming his own manager. It recommends that the Secretary of the Interior be divested of power to annually renew expired trust allotments. When trust allotments expire the Secretary should promptly issue patents-in-fee to such allotments.

The subcommittee recommends that a card file be assembled at once in the central office of the Indian Bureau with a separate card for each Indian—man, woman or child—whose property is held in trust status by the Indian Bureau and that said card shall contain all essential up-to-date information regarding the trust property and rights in trust property of the individual thereon listed.

## CRITERIA WHICH HAVE BEEN USED IN DETERMINING THE QUALIFICATIONS OF INDIAN TRIBES FOR MANAGING THEIR OWN AFFAIRS

On February 8, 1947, Mr. William Zimmerman, then Acting Commissioner of Indian Affairs submitted certain testimony regarding the termination of Indian Bureau supervision over selected Indian groups, before the Senate Committee on the Post Office and Civil Service, Sen-

ator William Langer, of North Dakota, chairman (officers and employees of the Federal Government, hearing before the Committee on Post Office and Civil Service, U.S. Senate, 80th Cong., 1st sess., on S. Res. 41, pt. 3, p. 547, Washington, 1947). In determining the readiness of specific Indian groups for termination Mr. Zimmerman took four factors into account as follows:

The first one is the degree of acculturation of the particular tribe. That includes such factors as the admixture of white blood, the percentage of illiteracy, the business ability of the tribe, their acceptance of white institutions and their acceptance by the whites in the community.

The second factor is the economic condition of the tribe, principally the availability of resources to enable either the tribe or the individuals, out of their tribal or individual assets, to make a reasonably decent living.

The third factor is the willingness of the tribe and its members to dispense with Federal aid.

The last criterion is the willingness and ability of the State in which the tribe is located to assume the responsibilities.

Although this statement is on the surface an entirely plausible and reasonable approach to the problem of selecting out progressive Indian groups for termination it is potentially another roadblock to full Indian citizenship. This is because it assumes implicitly that Indians must be considered as members of tribal groups rather than as individual citizens. The endless complications involved in finding the right combination of factors for each Indian tribe as a whole are not entirely conducive to termination of Indian Bureau supervision over the group as individuals.

To look at it from another angle for a moment, are we to assume that the Federal Government necessarily has an obligation to supervise Indians as tribes until each of



the four criteria mentioned is met in every detail without question? Will there not always be those who, for reasons of their own, will oppose the finding that some one tribe has met all these requirements in every detail?

Hearings have been held by the Joint Committees of Interior and Insular Affairs of the House and Senate on all of the groups (except New York Indians) mentioned by Mr. Zimmerman as ready under his criteria for immediate termination. Yet in each case a detailed examination of the individual tribal situation showed that one or more of Mr. Zimmerman's criteria were not fully met. In the case of California no less than 115 distinct groups of Indians had to be considered, in western Oregon no less than 60 distinct groups.

The impracticability of dealing with Indians as tribes was long ago recognized in effect by the Indian Bureau when it developed a system of Indian census rolls in terms of specific jurisdictional units. Hence the jurisdiction took the place of the tribe as a social unit for Indians. The totemic clan group, which was in many instances the real local unit, was completely passed over in practical administration. The band was more frequently recognized but then primarily as a subdivision under some larger administrative agency or reservation. Mr. Zimmerman's tribal groups are simple jurisdictional units and to that extent artificial groupings of Indian individuals. The jurisdictional units are artificial inasmuch as they are constantly undergoing shift and rearrangement to suit administrative convenience and do not in the majority of instances represent any aboriginal Indian social group, be it tribe, band, or clan.

Hence the proposition that it is possible to release Indians from Indian Bureau supervision jurisdiction by jurisdiction, under a fixed series of selected criteria, is open to question. The ineffective, and in most instances inactive, tribal governments are the least desirable types

of civic social groupings for Indians. Immigrants do not become citizens as tribal groups and neither should Indians. It is by dissolving the jurisdictional system now imposed on Indians by the Indian Reorganization Act that Indians can become free of these special restrictions.

### THE URGENT NEED FOR CONTINUED INVESTIGATION OF AND REPORTING ON THE ADMINISTRATION OF INDIAN AFFAIRS

The findings of this subcommittee on the matter of Federal-Indian relations indicates, more than anything else, the urgent need for congressional attention to the question of continued Indian wardship. The Sacramento area office neglected to report on many rancherias in response to the committee questionnaire of 1953. Many of the problems faced today in this field were faced by the Congress a hundred years ago. For example, the charge of corruption in the administration of Indian Affairs has been an almost perennial complaint since the time, at least, of the 1860's. Since the passage of the General Allotment Act in 1887 Congress has endeavored to effect a means whereby Indians could own their own property as individuals, and come under the same local laws.

Today the problem of Indian wardship is still with us and growing steadily more expensive and expansive. The Indian Bureau has been charged with the guardianship of Indian property in addition to the responsibility of preparing the Indians for full citizenship. The passage of House Concurrent Resolution 108 had charged the Bureau of Indian Affairs with the responsibility of preparing Indians for full citizenship as rapidly as possible. Since, however, the subcommittee feels that the Indian Bureau as an organ of the Federal Government specifically charged with the function of administering Indian affairs and property will not of itself initiate the necessary steps to terminate its own services through assisting individual Indians to become full citizens, it



recommends transfer of certain Indian Bureau functions to other Federal agencies with a view to making it possible for the Bureau to concentrate more effectively on the mandate embodied in House Concurrent Resolution 108.

Finally, an observation or two on the relationships between Congress, the public, and the Indians appears pertinent here.

Private organizations have assisted, and it is hoped will continue to assist, the Congress in its deliberations on legislative matters affecting the American Indian; from such sources, valuable funneling of opinion can be achieved, so that the Congress will have a full appreciation of the attitudes, hopes, and desires of our Indian citizens, and at the same time the latter may gain a full understanding of the aims and objectives of the legislative program.

Some critics of the congressional program for Indians apparently overlook the fact that not only individual Indians but whole tribes have asked or pleaded for termination of Federal supervision over their lives and property. The same persons may frequently overlook the fact that while in a sense Federal supervision under the Indian Reorganization Act constitutes protection, it also singles out a worthy group of fine American citizens and places them under restrictions and controls which tend to kill individual initiative or desire for advancement. On the basis of 103 years of programing by the Federal Government, through the Department of the Interior, Members of Congress can only conclude that there have not been made available to our Indian fellow citizens those benefits which our modern concept of citizenship participation prescribe for all citizens.

Membership of the House Indian Affairs Subcommittee during the 83d Congress came from areas populated by more than 250,000 Indians in the United States and

Alaska. The undersigned are convinced, from a vantage point of collective years of working in this field, that if there is one bulwark against hasty, ill-conceived legislation affecting the American Indian, it must lie within the membership of the Indian Affairs Subcommittees of the House and Senate. As with all other legislation, members must act as experience, conscience, and the very best advice obtainable from all available sources dictate action. To impute indifference, response to special interests, political partisanship, lack of sympathy for, or understanding of, this complex problem to Congressmen, is unrealistic and—in a very real sense—unfair to all concerned.

The most frequent argument used in attacking the current congressional program follows this line: Congress is endangering the Indian cultures, moral traditions, and violating the sanctity of values handed down for generations. Indian tribes should have the right to determine their own destinies and the right to maintain their own identity, distinct from other citizens of the United States.

The undersigned believe that the current congressional program might be described more accurately in this manner: American history, including the advance of western civilization on the North American Continent since 1800 and the settlement and development of State after State in the great western expanse of the United States, has involved a change and adaptation in the aboriginal culture patterns and moral values to meet the changed situation in which the Indians find themselves. Congress now recognizes that these changes in the manner of living of Indians require redefinition of the status in which these worthy people were placed during the period of their acculturation and integration into western civilization.

Today there is no possibility of recapturing the Indian way of life which characterized the great unfenced expanses of an undeveloped continent wherein tribes roamed



at will and were impeded only by clashes with stronger and more numerous groups in bloody, intertribal warfare. The present-day economic development of this country and its resources requires the cooperation of persons of Indian descent along with other citizens. The Indians as a whole have adopted the civilization and moral values of western civilization and must be dealt with having these considerations in mind.

With respect to Indian legislation, the subcommittee recognizes that at least a part of the resistance is opposition, not to the substance of the legislation, but opposition because of apprehension born of definite misinformation—deliberate or otherwise—channeled to tribes or individuals by interested parties.

Private organizations and individuals claiming to represent the American Indian can do no greater disservice to their cause than by acting as a barrier to understanding of the Federal program, rather than a bridge. Yet, the record strongly suggests that there are those small groups of individuals who, while claiming to represent the interest of the Indians, are in actuality seeking only to keep them in status quo so that they—the self-styled spokesmen for the Indian—can perpetuate the continuing need for their own "services" and thus continue to enjoy positions of prestige, importance, or profit to themselves alone. To accomplish this end, subcommittee files reveal, such groups and individuals, including some otherwise held in high public esteem, have disseminated untruths and misinformation to the very people whose interests they claim to represent. From such untruths and misinformation has flowed, not unexpectedly, apprehension on the part of the Indians, and indignation on the part of the non-Indian public sincerely interested in Indian welfare. Certain groups have claimed, and some Indians have repeated the assertion, that the current congressional approach has resulted in a negative attitude on the part of the Indian and in an attitude of resigna-

tion to the inevitable, which approach will be in all instances "bad for the Indian." The experiences of the subcommittee during the 83d Congress demonstrated to subcommittee members that tribes and individuals previously dealing with the Congress through these groups and individuals (frequently misrepresenting the facts) have gotten an entirely different picture of the congressional program when directly dealt with. The subcommitte and its staff have been watchful in this respect and must continue to be so in the future.

Nor do the activities of these small self-styled spokesmen for the Indians stop here. They have been known to indulge in the practice of literally bombarding the Indian subcommittees of the House and Senate with inspired telegrams, letters and to use many other similar pressures when Indian legislation has been under consideration. They have also used the same technique with the Office of the Chief Executive of this Nation in an effort to obtain veto or other action on Indian legislation. The deceptive and dishonest element in this situation is the fact that the real Indians themselves are almost completely drowned out by the high-powered propaganda machine of the "professional Indians" and their manipulators.

An additional problem of some magnitude is presented by a large group of persons, many of whom have apparently little or no Indian blood, who persist—as "professional Indians"—in "free loading" at Government or tribal expense under the guise of incompetent Indians.

Continued surveillance of progress under the directive of House Concurrent Resolution 108 will have a decisive effect in the accomplishment of the policy therein envisaged. The subcommittee therefore, recommends a continuation of the present House committee investigation, so fruitful in its results to date, as a means of supplying



an intelligent framework within which the legislative body may act.

WILLIAM HENRY HARRISON, *Chairman,*
WESLEY A. D'EWART,
E. Y. BERRY,
JACK WESTLAND,
A. L. MILLER (ex officio),
WAYNE N. ASPINALL,
GEORGE A. SHUFORD,
*Special Subcommittee on Indian Affairs.*

NOTE OF COMMITTEE CLERK.—It is pointed out that the recommendations of the subcommittee set out above were developed over the period embracing the 1st and 2d sessions of the 83d Congress and that subsequent legislative action effecting some recommendations has been taken since formulation of such recommendations, including the signing into public law of several then pending legislative matters.

**DEF. EX. 17**

CATAWBA TRIBE OF INDIANS OF
SOUTH CAROLINA
CATAWBA GENERAL COUNCIL
Rock Hill, South Carolina
January 3, 1959

RESOLUTION

Whereas, Catawba tribal members have sought aid on complaint that under Federal trusteeship, members held no title to the property upon which they could obtain credit to build homes, or could claim ownership of the property, if they did build them; could improve or develop the property only under existing federal restrictions pertaining to the cutting of timber or clearing of land or developing water, and

Whereas the Catawba tribal members desire the division of the 3388.8 acre reservation in York County, South Carolina and it's property and assets among the individual members of the tribe on an equitable basis and,

Whereas this resolution provide that the Catawba Indians get patents to the land over which the United States Bureau of Indian Affairs holds trusteeship responsibility, and protection against the State of South Carolina usurping the acreage which the Catawbas now own, and,

Whereas, this land cannot now be alienated without the enactment of authoritive legislation,

Now therefore, BE IT RESOLVED that, in view of the benefits that will accrue to all of the members of the tribe by the equitable distribution of the tribal assets, it's General Council assembled in regular meeting hereby formally request the Honorable Robert W. Hemphill, our Congressman from the Fifth District, to introduce and secure passage of appropriate legislation to accomplish the removal of Federal restrictions against the alienation



of Catawba land, in York County, South Carolina, so that it can be patented, and to provide for an equitable distribution of all the tribal assets amongst the members of the Catawba Tribe, and to provide for the protection of minors and incompetents, and do all those things necessary to accomplish the purposes of this legislation at no cost to the Catawba Indians or claim against their assets, and that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe.

/s/ Albert Sanders, Chief
Chief

/s/ Roy Brown
Vice Chief

/s/ Garfield P. Harris
Secretary-Treasurer

/s/ Willie A. Sanders
Trustee

**DEF. EX. 18**

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Cherokee Indian Agency
Cherokee, North Carolina

JAN 26 1959

Commissioner, Bureau of Indian Affairs
Washington 25, D.C.

Attention: Branch of Tribal Programs

Dear Sir:

Attached is a copy of a resolution passed by the Catawba General Council at their meeting held January 3, 1959. The minutes of this meeting were transmitted to you by letter of January 15, 1959.

The resolution states that the Council requested the Honorable Robert W. Hemphill, their Congressman from the Fifth District, to introduce and secure passage of appropriate legislation to accomplish the removal of Federal restrictions against the alienation of Catawba lands in York County, South Carolina, so that the land can be removed from trust status in order to provide for an equitable distribution of all the tribal assets among the members of the Catawba Tribe, providing for the protection of minors and incompetents, and do all these things necessary to accomplish the purposes of this legislation at no cost to the Catawba Indians or claims against their assets and that nothing in the legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe.

This matter has been discussed previously in meetings with Congressman Hemphill at which time Messrs. H. Rex Lee and Homer Jenkins were present. The resolution merits favorable consideration, and it is believed



that the Bureau should do everything possible in cooperation with Congressman Hemphill in securing necessary legislation to carry out the intentions of the Catawba General Council.

This office received two copies of the resolution with one marked for the Commissioner and the other one for this office. It is not known where the original copy is, but assume that since Mr. Bitney was at the meeting and has been there since that time, that perhaps he has the original copy of the resolution, or perhaps the original was sent direct to Congressman Hemphill.

It will be appreciated if we are kept advised as to the action taken by Congressman Hemphill in this matter.

Sincerely yours,

/s/ Richard D. Butts
Superintendent

**DEF. EX. 19**

Catawba Indian Reservation
Rock Hill, South Carolina
March 28, 1959

Special Tribal Council was call at 10.AM at the catawba Indian school For Congreessman Robert W. Hemphill to explian the contract that was drawn up by the Bureau Of Indian Affairs.

Presiding Chief John Albert Sanders.

The following Executive was present, Chief John Albert Sanders Vic-Chief Roy Brown, Secretary & Treasurer Garfield C.Harris, Trustte Idle Sanders,and Trestee Willie Sanders.

Members repesenting the Federal Government was. Sup't. Richard D, Butts, Wilson Lathem Congressman Robert W Hemphill.

Mr. Jenkens, member of the Bureau Of Indian Affairs.
State Committee,York County House Of Repesentative Col. Bates Harvy. members of Tribal present was. 61.

Conducting Chief John Albert Sanders.

1 Mr.Bates Harvy was first speaker.

2 Congressman Robert W. Hemphill explained the Contract that was drawn up by the Bureau Of Indian Affairs. Quite a few questions was asked during his talk,which he answered with Mr Jenkens aiding him in things he wasn,t able to clarify. as, to the rules of the Bureau Of Indian Affiars.

Congressman Robertw Hemphill was ask by one of the members,was the old reservation include in this contract, his reply was no. because it never was included with the new Reservation.

Congressman Robert W. Hemphill left following his talk.



Meeting was call to order by Chief John Albert Sanders. vote was made by the members.

57 votes was casted.

40 votes in favor excepting the Contract that was drawn up by the Bureau Of Indian Affiars.

17 oposed.

Contracted was excepted by the largest numberof votes.

/s/ Garfield C. Harris
GARFIELD C. HARRIS
Secretary&Treasurer

The following members was present.

1. Ayers, Hael Ervin
2. Ax Ayers Sarah (Sanders)
3. Ayers William Frell
4. Beck Fletcher Jr.
5. Beck Major Jr.
6. Beck Samuel John
7. Beck Hollen
8. Blue Arnold
9. Blue Lillion
10. Blue Eva
11. Blue Herbert
12. Blue Leroy
13. Blue Randall Lauon
14. Brindles, Missouri
15. Brown Emma
16. Brown Roy
17. Bryson, Blanch
18. Cabaness, Marcile
19. Campbell, Nola (Harris)
20. Canty, Alonza George
21. Canty, Heyward
22. Canty, Thalma
23. Ferrell, Alberta
24. Fox Antonia
25. Garcia, Betty Jennifer
26. George, Ephriam D.
27. George Isabelle
28. George, Charles Louis
29. George Landrum
30. George Elsie
31. Harris, Alfred
32. Harris, David Adam
34. Harris, Dewuy
35. Harris Floyd
36. Harris Henry A.
37. Harris Joseph W.
38. Harris Mary
38. Harris Richard J.
40. Harris Thoarore
41. Harris Garfield C.
42. Harris Wesley T.
43. Harris Dauglas W.
44. Pyler Hubert
45. Robertson Elizabeth
46. Sanders Albert
47. Sanders Vera
48. Sanders Ada I.
49. Sanders John I.
50. Sanders Arzada
51. Sanders Thomas M.
52. Sanders Willie
53. Sanders Verda
54. Simmers Marie
55. Strickland Pearly
56. Starnes Lucy
57. Trimnal Virginia
58. Wade Horse Gary
59. Wade France
60. Gordon Eliza
61. Harris Georgia

Catawba Indian Reservation
Rock Hill, South Carolina.
March 28, 1959

Special Tribal Council was called becuase a pitition request it, sixty ( 60 ) members. They wanted Col. Bates Harvy to give them se-answers to the Resolution pass in January 3,1959.

Meeting was called to order at 8,PM. 51 member.

Presiding and conducting Secretary & Treasurer Garfield C.Harris.

The following Excutive was present Secretary & Treasurer Garfield C Harres, Trustee,John I Sanders, and Trustee Willie Sanders.

Anouncements. Special Tribal Council to be held March 28,1959 at 10-AM.For Congressman Robert W Hemphill.

Invocation by L.D. S Church,Branch President Ephriam George.

Meeting was turned over to Col Bates Harvy to answer some questionin rggards to Resolution pass January 3,1959.

Question. Ephiarm. What was in the Resolution?

Answer. by Col. Bates Harvy. he read the Resolution.

Question. by Gary Wade,is old Resevation included withland division.

Answer. Col Bates Harvy. No.

Question, by Nelson Blue, Could a partil with drawelbe arranged?

It was explained by Samul Beck.



Nelson Blue gave ashort talk,explain his views cncerning the division.

Mr. Faris was give afew minutes to explain art and a possibility of a building to put Indian relic, in.

Bendition by Samul John Beck.

/s/ Garfield C. Harris
GARFIELDC.HARRIS
Secretary & Treasurer

## MINUTES OF SPECIAL MEETING OF THE CATAWBA COUNCIL HELD AT THE CATAWBA INDIAN SCHOOL ON SATURDAY MARCH 28, 1959, ROCKHILL, S. C.

This meeting was called to order by Chief Albert Sanders at 10:00 a.m., and in addition to the members of the Tribe, United States Congressman Robert Hemphill, State Representative Harvey, Homer Jenkins, Chief of Tribal Programs, Superintendent Richard D. Butts, Assistant to the Superintendent Andrew W. Lathem and Messers Ernie Downing and Cliff Quayle of the Oklahoma City Area Office of Public Health, and representative from the Evening Herld, the Rockhill paper, were present.

Chief Albert Sanders introduced State Representative Bates Harvey, chairman of the State Legislative Committee on Indians, and Harvey gave a brief resume of the memorandum of understanding between the Catawba Tribe, the State of South Carolina and the United States Government. Colonel Harvey further stated that it was the intentions of the State Committee to carry out the wishes of the Catawba Tribe in so far as it was possible so to do. Congressman Hemphill of the Fifth Congressional District, was then introduced by Colonel Harvey as a person who is interested in the affairs of the Catawba Tribe and who has spent much time and exerted much effort on Catawba matters.

Congressman Hemphill then addressed the group and stated the purpose of the meeting being to explain to the Catawbas what the Federal Government can do and will do for them. Congressman Hemphill stated that immediately after his election a group of interested persons contacted him relative to the Catawba situation and explained that the Catawbas were unable to secure credit through normal channels. Also, that the group was interested in preserving the traditions of the Catawbas



and assisting in any way they could to better the lot of the Tribe. Congressman Hemphill stated that on his first trip to Washington he contacted Associate Commissioner Rex Lee and discussed the memorandum of understanding with him and was advised by Mr. Lee that the Bureau was of the opinion that the Catawba people were not in as great a need of Federal Assistance as most of the other Indians and therefore Federal Services to the Catawbas could not be expanded.

Congressman Hemphill then stated that after the Catawba Tribal meeting on January 3, 1959, at which time the resolution was passed to divide the assets of the Tribe, that a group of the Catawbas contacted him and requested an audience with him on a Sunday afternoon to discuss the Council Resolution and the proposed bill. He further stated that usually he did not even write a letter on Sundays but since this was a pressing matter and of the utmost importance to the Catawba people, he agreed to meet and discuss those matters with them. Congressman Hemphill advised the group that the proposed bill had not been introduced in the house and that he would not introduce the bill without the approval of the people. He then read the resolution passed in the Council on January 3, 1959. When the question was raised as to the effect which the resolution would have on the status of the 630 acre of land held in trust for the Catawbas by the State of South Carolina, Representative Harvey stated that there were no plans at present for changing the status of such lands. When the question was raised as to the cost of division of the assets, Congressman Hemphill referred this question to Mr. Jenkins, who stated that such cost would be borne by the Federal Government from appropriated funds.

Congressman Hemphill advised the group that on the date after receiving a copy of Council Resolution passed January 3, 1959, he preceeded in having legislation drawn up to carry out the intent of the resolution. Congressman

Hemphill stated that in his opinion the memorandum of understanding had been of no advantage to the Tribe. He then gave some history of the Tribal lands and stated that the Catawbas had no treaties with the Federal Government and that the reason for Bureau officials being in the picture is due to the experiences which they have had with other tribes.

The proposed bill was then read and explained by Congressman Hemphill. Several questions was raised by various members of the Tribe. Douglas Harris asked who would be considered members of the Tribe? Mr. Jenkins answered the question by reading Article 2 of the constitution as relates to membership. Another question was raised as to membership and title of a child born to a serviceman outside the State of South Carolina? Mr. Jenkins stated that other tribes had passed a resolution to clarify questions of this nature and that the Catawbas could do likewise. Douglas Harris stated that he made the motion for passage of the resolution of January 3, 1959 but since there was disagreement on the contents of the resolution he wanted to know if it were possible to give those members of the Tribe, who wanted to withdraw from Federal Supervision, their share of the Tribal assets and those who wanted to remain under Federal Supervision could stay on as they now are. This question was not answered at the time but later in the meeting when Hayward Kanty asked the same question Mr. Jenkins stated that at Kalamath part of the membership were getting out and part staying on. Congressman Hemphill stated that unless there was a clear majority for the bill he would not introduce the bill but would drop the matter, as he had many other pressing matters on which to spend his time. Chief Albert Sanders stated that the wishes of the Tribe had been expressed in the resolution passed January 3, 1959 and it was not intended that a vote would be taken at this meeting. Douglas Harris stated that there was several questions he would like an answer on. Such as what happened to the money from the sale of land to the city of Rockhill? Management of the Tribal herd and what good was the herd doing the Tribe? To the question asked on the money from the sale of land to the city of Rockhill, Congressman Hemphill advised Mr. Harris that the money was being held for the Tribe's decision as to the use to be made of such funds. Congressman Hemphill and Representative Harvey both stated that since there seemed to be quite a lot of oppositions to the resolution of January 3 and the proposed bill that they would like to see the Tribe take another vote before they continued further in the matter, and both further stated that they did not plan to be at the meeting when such vote was taken.



The discussion of the proposed bill was then continued and questions were raised as to the method of divisions of the assets, restrictions against purchases of any of the lands by Negros, status of the 630 acre tract held in trust by the State and the effect on Tribal members who are on welfare. It was explained to the group that members who now held assignments would be given first choice of the lands now assigned to them provided such assignment did not exceed his or her pro-rata share or that he pay for any land in access to his pro-rata share. As to the question raised concerning prohibiting Negros from purchasing any of the lands not taken up by the members of the Tribe, both Congressman Hemphill and Mr. Jenkins stated that if such restriction were included in the bill,the bill would not stand a chance of passing. Representative Harvey stated that any persons on welfare who held title to property would be required under State Law to give a lien on such property. Mr. Jenkins then explained further as to the method of determining the shares each member would be entitled to under the provisions of the proposed bill. The meeting then recessed and Congressman Hemphill and Representative Harvey departed.

When the meeting reconvened, Superintendent Butts explained to the group that Congressman Hemphill wanted another vote by the people as to their decision on the proposed Bill and further stated that the Bill was rather conclusive, and with careful study will answer most any questions concerning the distribution of the Tribal assets. The question was then raised as to what effect passage of the proposed bill would have upon the medical care which the Tribal members were receiving through the United States Public Health Service. Mr. Downing and Mr. Quayle were introduced and Mr. Downing explained the United States Public Health Policy. He stated that only those persons not able to pay for medical services were entitled to medical service provided by the United States Public Health. Some of the members stated that they were under the impression that all members of the Catawba Tribe regardless of their fanicial status were entitled to the Public Health services.

A vote by secret ballot was then taken on the proposed bill with all those who desired that Congressman Hemphill introduce the bill to mark their ballots yes, and all those that were opposed to mark their ballots no. Tabulation of the ballots disclosed that 40 voted yes and 17 voted no. Superintendent Butts then pointed out that any of the members who wanted to suggest any changes in bill could do so by submitting the changes they desired to Congressman Hemphill. The meeting then adjourned.



NOTE:

Both Congressman Hemphill and Representative Harvey requested that they be advised of the desires of the Tribe relative to the proposed bill after a vote was taken. Superintendent Butts advised both Congressman Hemphill and Representative Harvey of the results of the vote later in the afternoon of March 28.

/s/ Andrew W. Lathem
ANDREW W. LATHEM,
Assistant to the Supt.

March 31, 1959

Concurred

/s/ Richard D. Butts
RICHARD D. BUTTS, Superintendent
Cherokee Agency, North Carolina

Copy Sent to: Garfield Harris 3/31/59
Branch of Tribal Program 3/31/59

**DEF. EX. 22**

## CATAWBA INDIAN NATION

Mr. HEMPHILL. Mr. Speaker, I ask unanimous consent to address the House for 1 minute and to revise and extend my remarks.

The SPEAKER. Is there objection to the request of the gentleman from South Carolina?

There was no objection.

Mr. HEMPHILL. Mr. Speaker, I have introduced today legislation intended to clear up a situation with regard to the Catawba Indian Nation, which exists in South Carolina. These proud people who have always exhibited the best citizenship, have depreciated numerically from 6,000 people who owned 144,000 acres of land to 614, at the latest count, who own 4,000 acres of land. Unfortunately, the land is tied up today so that these people cannot borrow for their homes nor do they have the other privileges and responsibilities to which their citizenship entitles them. It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.

For many years these people have been excluded from the privileges of development as they hold no title, except mutual title, which the banks and other lending institutions cannot accept as collateral.

Chief Blue, who led his people for many years, told me the first time I asked him about this problem, that the people should be allowed to own the land, and borrow on it. He told me again the last time, which I went by to see him during the Easter recess. Chief Blue is retired now, but he can reflect on many years of honorable leadership. He wants his people to have the same privileges as other citizens.



The Catawbas have voted for this legislation. They just voted a resolution to have me introduce a bill. After the bill was prepared, I went to the district, met with those who showed enough interest to come, and they voted more than 2 to 1 for the bill introduced today.

Finally, Mr. Speaker, I want to thank and commend the Bureau of Indian Affairs for its help and cooperation. We have all worked hard on the problems presented and I hope and believe this legislation will be fruitful.

**DEF. EX. 23**

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Mr. William Sims
Room 5327
DQ

Tozier—Int. 4306

[SEAL]

DEPARTMENT OF THE INTERIOR

*INFORMATION SERVICE*

BUREAU OF INDIAN AFFAIRS

For Release JUNE 10, 1959

## INTERIOR DEPARTMENT FAVORS BILL PERMITTING CATAWBA INDIANS OF SOUTH CAROLINA TO DIVIDE THEIR TRIBAL PROPERTY

The Department of the Interior today announced its endorsement of H.R. 6128, a bill that will permit members of the Catawba Indian Tribe of South Carolina to divide their tribal assets and discontinue their special Indian relations with the Federal Government.

The Catawba Indians have requested such legislation and have explicitly approved the provisions of H.R. 6128.

The property to be divided consists of 3,388.8 acres of land under Federal trusteeship in York County, S.C., near Rock Hill; a tribal herd of 12 cattle; approximately 6,500,000 board feet of timber; and nearly $5,000 on deposit with the Bureau of Indian Affairs. The total estimated net Tribe is slightly over $250,000.

Under provisions of the bill, tribal members who have received an assignment or use right in particular tracts of



tribal land will be given the right to select these tracts as part of their distributive shares. The remainder of the tribal assets will be sold and the proceeds distributed. Any property not sold within two years after enactment will be conveyed to a trustee for liquidation and distribution.

The Catawba Indians have received services for many years from the State of South Carolina but have only a relatively short history of special relationships with the Federal Government. Under a 1943 agreement among the Tribe, the State, and the Bureau of Indian Affairs, the land now held in Federal trusteeship was bought for the Tribe by the State and conveyed to the United States in 1945. In addition, the tribe has had for many years a reservation of one square mile which is held in trust by the State. This will not be affected by H.R. 6128 unless the State Legislature takes action to have it included in the distribution plan.

Last fall the Bureau of Indian Affairs found 62 Catawba families living on the Federal trust land, 21 families living on the "old reservation" under the State, 26 families living Rock Hill, and 53 families living elsewhere. The total includes 614 Indians in 162 family groups.

In its report the Department pointed out that the Catawbas have advanced economically at a steady pace during the past 14 years and have now reached a position comparable to that of their non-Indian neighbors.

Last December the State of South Carolina appointed a five-man legislative committee to help the Catawbas in negotiating for removal of the Federal trust restrictions from their land. This committee has studied H.R. 6128 and endorsed it.

* * * *

**DEF. EX. 25**

## CATAWBA INDIAN TRIBE—DIVISION OF TRIBAL ASSETS

*For text of Act see p. 659*

Senate Report No. 863, Sept. 1, 1959
[To accompany S. 2596]

House Report No. 910, Aug. 17, 1959
[To accompany H.R. 6128]

The House bill was passed in lieu of the Senate bill. The House Report is set out.

### House Report No. 910

THE Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 6128) to provide for the division of the tribal assets of the Catawba Indian Tribe of South Carolina among the members of the tribe and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

### PURPOSE

The purpose of H.R. 6128, introduced by Representative Hemphill, is to provide for the division of the assets of the Catawba Indian Tribe of South Carolina among its enrolled members in approximately equal shares.

### NEED

Such legislation as this is necessary in order to close the roll of the Catawba Tribe and to distribute the bulk of the tribal assets among its members.

The Catawba Indians' relations with the Federal Government date back only to the 1940's. Their original reservation was set aside for them by treaty with South



Carolina in 1763. In 1840 they agreed to cede this reservation to the State except for a single square mile of land which is still held in trust for them by the State. In return the State agreed to furnish certain essential services for them.

Since 1943 the State, the Bureau of Indian Affairs, and the tribe have been working together to improve the economic conditions of the members. In 1945 the State bought 3,434 acres of land for the tribe and turned it over to the United States to be held in trust for them.

The Catawbas have advanced economically during the past 14 years and have reached a position that is comparable to their non-Indian neighbors. Many of them are employed in nearby communities. There are 162 Catawba families with 614 individual members. Eighty-three of these families live on restricted or reservation land. A nearly equal number live in Rock Hill, S.C., or elsewhere.

The tribal assets are valued at about $254,000 or about $1,500 per family. The assets consist principally of the tribal land which comprises nearly 4,000 acres, including 630 held in trust by the State of South Carolina.

The State appointed a five-man legislative committee on December 16, 1958, to assist in negotiating with the Catawbas to remove the Federal restrictions from their lands.

The Catawba General Council at a regular meeting on January 3, 1959, asked that Federal restrictions be removed from their lands and that deeds thereto be issued. On March 28, 1959, the general council met in special session and endorsed the terms of this bill, as introduced, by a vote of 40 to 17. A second opportunity will be offered for members to accept or reject the legislation by the plebiscite amendment proposed by the committee.

## COST

Enactment of H.R. 6128 will require no expenditure of appropriated moneys except for administrative expenses. The committee notes, on the other hand, that Federal expenditures on the reservation during the last fiscal year were approximately $7,200 for administration, realty and forestry supervision, and soil and moisture conservation work.

## COMMITTEE AMENDMENTS

The committee recommends amendment to the bill to provide for the holding of a plebiscite before any other action is taken under it and to provide for continuance of vocational training among the Catawbas until the tribe disbands.

## DEPARTMENTAL RECOMMENDATION

The report of the Secretary of the Interior dated June 8, 1959, is as follows:

U.S. DEPARTMENT OF THE INTERIOR,
*Washington, D.C., June 8, 1959.*

Hon. WAYNE N. ASPINALL,

*Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.*

DEAR MR. ASPINALL: Your committee has requested a report on H.R. 6128, a bill to provide for the division of the tribal assets of the Catawba Indian Tribe of South Carolina among the members of the tribe and for other purposes.

We recommend that the bill be enacted.

The Catawba Indians have requested this legislation; they have endorsed the provisions of the bill; and we believe that they are ready for this action.



The bill closes the membership roll, and provides for the distribution of all tribal property among the members in approximately equal shares. Members who have assignments of land from the tribe, or members of their families, are given the right to select the assignments as parts of their distributive shares. The remainder of the tribal property will be sold and the proceeds of the sale will be distributed. Any property that is not sold within 2 years will be conveyed to a trustee for liquidation and distribution. When the program is completed the Catawba Indians will cease to be subject to the Federal Indian laws, but their status and rights under South Carolina law will not be affected.

The Catawba Indians in South Carolina have only a relatively short history of relationships with the Federal Government. They made a treaty with South Carolina on November 10, 1763, by which their original reservation was set aside for them. In 1840 they agreed with the State to a cession of this reservation with the exception of a single square mile of land, which is still held in trust for them by the State. In return for the Catawba land, the State provided services to them. The United States never made a treaty with these Indians. They have no claims filed with the Indian Claims Commission.

Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the Federal Government was assuming guardianship of those Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards

In accordance with the memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and by warranty deed dated October 5, 1945, the State conveyed the land to the United States in trust for the tribe. It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.

A tabulation of Catawbas made in October 1958 shows 62 families living on restricted land, 21 families living on the "old reservation" under the State, 26 families living in Rock Hill, S.C. and 53 families living elsewhere. The total is 162 families with an enrollment of 614 Indians, and there are 120 white spouses.

The 3,388.8 acres that are held in trust by the United States and the 630 acres, known as the "old reservation," that are held in trust by the State comprise the tribe's total real property. Approximately 88 assignments covering 1,215 acres are made to individual tribe members. These assignments vary in size from approximately 1 acre to almost 80 acres. Some assignments are fully used; on others only a small portion is used for a homesite. Approximately 30 assignees are not living on their assignments. Other Indians who do not have assignments are living on assigned land or buying homes on them.

The assets of the tribe are estimated to be:

| | |
|---|---|
| Land (3,388.8 acres under Federal trusteeship) | $203,215.00 |
| Beef cattle, tribal herd (120 head and equipment) | 17,120.00 |
| Local fund on deposit at agency (sale of land, etc.) | 4,949.14 |
| Timber (6,500 thousand board-feet) | 30,512.00 |
| Total | 255,796.14 |
| Liabilities amount to | 1,400.00 |
| Net worth of tribe | 254,396.14 |

The Catawba Indians have advanced economically at a steady pace during the past 14 years, and have now reached a position that is comparable to their non-Indian



neighbors in the community. The following is a breakdown of the employment of the 162 families of the tribe:

| Source of income | By families | | By jobs, etc. | |
|---|---|---|---|---|
| | Number | Percent | Number | Percent |
| Jobs in industry | 73 | 47 | 80 | 46 |
| Skilled labor | 31 | 20 | 37 | 21 |
| Armed services | 10 | 7 | 14 | 8 |
| Retired (draw social security) | 7 | 5 | 7 | 4 |
| Welfare | 9 | 6 | 9 | 5 |
| Other sources (employed, various jobs) | 24 | 15 | 27 | 16 |
| Total | [1]154 | 100 | [2]174 | 100 |

[1] There are 5 family heads unemployed, and no information is available on 3 family heads.

[2] There are a total of 20 families that have more than 1 person with a source of income from jobs in industry, skilled labor, armed services, and other sources.

During the fiscal year 1958, it was estimated that the following costs were incurred by the Bureau of Indian Affairs for the Catawba Indians:

| | |
|---|---|
| General administrative work: 11 days, plus $849.60 interim costs | $1,481.00 |
| Realty supervision: 13½ days, plus $910.44 interim costs | 1,441.91 |
| Forestry supervision: 8½ days, plus $243.12 interim costs | 511.33 |
| Soil and moisture conservation: 11¾ days, plus interim cost of labor | 3,795.00 |
| Total | 7,229.24 |

Interim costs are based on cost of general work relating to Catawba matters carried on between trips to the reservation.

Administrative, realty, forestry, and other supervision for the Catawba Indians is vested in the Superintendent of the Cherokee Indian Agency, Cherokee, North Carolina.

In the memorandum of understanding the tribe agreed to organize to transact community business, and on June

30, 1944, an IRA constitution and bylaws were approved by the Secretary of the Interior. These documents spell out membership requirements that will be used as a basis for preparing the final roll as required by the bill.

The State of South Carolina appointed a five-man State legislative committee on December 16, 1958, to assist in negotiating with the Catawbas to remove the Federal restrictions from their lands. This committee has studied the proposed legislation and has endorsed it.

The Catawba General Council at a regular meeting on January 3, 1959, asked that Federal restrictions be removed from their lands and that they be granted deeds. On March 28, the general council met in a special meeting and endorsed the terms of the bill by a vote of 40 to 17.

If this bill is enacted, the costs of appraisals, surveys, etc., will be paid by the Bureau of Indian Affairs out of regularly appropriated funds.

The Bureau of the Budget has advised us that there is no objection to the submission of this report.

Sincerely yours,

ROGER ERNST,
*Assistant Secretary of the Interior.*

## COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs recommends enactment of H.R. 6128, as amended.



**DEF. EX. 26**

SENATE

Calendar No. 885

86TH CONGRESS
*1st Session*

REPORT
No. 863

# PROVIDING FOR THE DIVISION OF THE TRIBAL ASSETS OF THE CATAWBA INDIAN TRIBE OF SOUTH CAROLINA AMONG THE MEMBERS OF THE TRIBE

---

SEPTEMBER 1 (legislative day, AUGUST 31), 1959.—
Ordered to be printed

---

Mr. NEUBERGER, from the Committee on Interior and Insular Affairs, submitted the following

## REPORT

[To accompany S. 2596]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 2596) to provide for the division of the tribal assets of the Catawba Indian Tribe of South Carolina among the members of the tribe, and for other purposes, having considered the same report favorably thereon with an amendment and recommend that the bill as amended to pass.

The amendment is as follows:

On page 4, line 22, after the word "date" insert "of the notice provided for in section 1".

### PURPOSE OF THE BILL

The purpose of S. 2596, as amended, is to provide for the division of the assets of the Catawba Indian Tribe

of South Carolina among its enrolled members in approximately equal shares.

NEED

S. 2596 is necessary in order to close the roll of the Catawba Tribe and to distribute the bulk of the tribal assets among its members.

The Catawba Indians' relations with the Federal Government date back only to the 1940's. Their original reservation was set aside for them by treaty with South Carolina in 1763. In 1840 they agreed to cede this reservation to the State except for a single square mile of land which is still held in trust for them by the State. In return the State agreed to furnish certain essential services to them.

Since 1943 the State, the Bureau of Indian Affairs, and the tribe have been working together to improve the economic conditions of the members. In 1945 the State bought 3,434 acres of land for the tribe and turned it over to the United States to be held in trust for them.

The Catawbas have advanced economically during the last 14 years and have reached a position that is comparable to their non-Indian neighbors. Many of them are employed in nearby communities. There are 162 Catawba families with 614 individual members. Eighty-three of these families live on restricted or reservation land. A nearly equal number live in Rock Hill, S.C., or elsewhere.

The tribal assets are valued at about $254,000 or about $1,500 per family. The assets consist principally of the tribal land which comprises nearly 4,000 acres, including 630 held in trust by the State of South Carolina.

The bill states that its provisions shall not become effective until a majority of the Indians agree to divide the tribal assets. If all the assets have not been disposed of within 2 years following agreement, they will be turned over to a trustee selected by the Secretary of the Interior for disposition.



The State appointed a five-man legislative committee on December 16, 1958, to assist in negotiating with the Catawbas to remove the Federal restrictions from their lands.

The Catawba General Council at a regular meeting on January 3, 1959, asked that Federal restrictions be removed from their lands and that deeds thereto be issued. On March 28, 1959, the general council met in special session and endorsed the terms of this bill, as introduced, by a vote of 40 to 17. A second opportunity will be offered for members to accept or reject the legislation under the terms of section 1 of the bill.

Enactment of S. 2596 will require no expenditure of appropriated moneys except for administrative expenses, and will result ultimately in a reduction in expenditures for Indians.

The report of the Secretary of the Interior dated August 27, 1959, is as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
*Washington, D.C. August 27, 1959.*

Hon. JAMES E. MURRAY,
*Chairman, Committee on Interior and Insular Affairs,*
*U.S. Senate, Washington, D.C.*

DEAR SENATOR MURRAY: Your committee has requested a report on S. 2596, a bill to provide for the division of the tribal assets of the Catawba Indian Tribe of South Carolina among the members of the tribe and for other purposes.

We recommend that the bill be enacted.

The Catawba Indians have requested this legislation; they have endorsed the provisions of the bill; and we believe that they are ready for this action.

The bill provides for closing the membership roll, and for distributing all tribal property among the members in approximately equal shares. Members who have assignments of land from the tribe, or members of their families, are given the right to select the assignments as parts of their distributive shares. The remainder of the tribal property will be sold and the proceeds of the sale will be distributed. Any property that is not sold within 2 years will be conveyed to a trustee for liquidation and distribution. When the program is completed, the Catawba Indians will cease to be subject to the Federal Indian laws, but their status and rights under South Carolina law will not be affected.

The Catawba Indians in South Carolina have only a relatively short history of relationships with the Federal Government. They made a treaty with South Carolina on November 10, 1763, by which their original reservation was set aside for them. In 1840 they agreed with the State to a cession of this reservation with the exception of a single square mile of land, which is still held in trust for them by the State. In return for the Catawba land, the State provided services to them. The United States never made a treaty with these Indians. They have no claims filed with the Indian Claims Commission.

Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the Federal Government.



In accordance with the memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and by warranty deed dated October 3, 1945, the State conveyed the land to the United States in trust for the tribe. It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.

A tabulation of Catawbas made in October 1958 shows 62 families living on restricted land, 21 families living on the old reservation under the State, 26 families living in Rock Hill, S.C., and 53 families living elsewhere. The total is 162 families with an enrollment of 614 Indians, and there are 120 white spouses.

The 3,388.8 acres that are held in trust by the United States, and the 630 acres, known as the "old reservation," that are held in trust by the State, comprise the tribe's total real property. Approximately 88 assignments covering 1,215 acres are made to individual tribal members. These assignments vary in size from approximately 1 acre to almost 80 acres. Some assignments are fully used; on others only a small portion is used for a homesite. Approximately 30 assignees are not living on their assignments. Other Indians who do not have assignments are living on assigned land or buying homes on them.

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| Total | 255,796.14 |
| Liabilities amount to | 1,400.00 |
| Net worth of tribe | 254,396.14 |

The Catawba Indians have advanced economically at a steady pace during the past 14 years, and have now reached a position that is comparable to their non-Indian

neighbors in the community. The following is a breakdown of the employment of the 162 families of the tribe:

| Source of income | By families | | By jobs, etc. | |
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| | Number | Percent | Number | Percent |
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| Other sources (employed—various jobs) | 24 | 15 | 27 | 16 |
| Total | [1]154 | 100 | [2]174 | 100 |

[1] There are 5 family heads unemployed, and no information is available on 3 family heads.

[2] There are a total of 20 families that have more than 1 person with a source of income from jobs in industry, skilled labor, armed services, and other sources.

During the fiscal year 1958, it was estimated that the following costs were incurred by the Bureau of Indian Affairs for the Catawba Indians:

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| Soil and moisture conservation: 11¾ days, plus interim cost of labor | 3,795.00 |
| Total | 7,229.24 |

Interim costs are based on cost of general work relating to Catawba matters carried on between trips to the reservation.

Administrative, realty, forestry, and other supervision for the Catawba Indians is vested in the Superintendent of the Cherokee Indian Agency, Cherokee, N.C.



In the memorandum of understanding the tribe agreed to organize to transact community business, and on June 30, 1944, an IRA constitution and bylaws were approved by the Secretary of the Interior. These documents spell out membership requirements that will be used as a basis for preparing the final roll as required by the bill.

The State of South Carolina appointed a five-man State legislative committee on December 16, 1958, to assist in negotiating with the Catawbas to remove the Federal restrictions from their lands. This committee has studied the proposed legislation and has endorsed it.

The Catawba General Council at a regular meeting on January 3, 1959, asked that Federal restrictions be removed from their lands and that they be granted deeds. On March 28 the general council met in a special meeting and endorsed the terms of the bill by a vote of 40 to 17. The bill provides that it will become effective only when a majority of the adult tribal members agree.

If this bill is enacted, the costs of appraisals, surveys, etc., will be paid by the Bureau of Indian Affairs out of regularly appropriated funds.

The Bureau of the Budget has advised us that there is no objection to the submission of this report.

Sincerely yours,

ROGER ERNST,
*Assistant Secretary of the Interior.*

**DEF. EX. 29**

Nov. 17, 1959

Mr. Raymond Bitney, Program Officer
Andrew Jackson Hotel
Rock Hill, South Carolina

Dear Mr. Bitney:

Enclosed are 300 copies of an explanation of the Catawba Act as interpreted by the Solicitor's Office. Also 300 copies of the agreement form that has been approved for use. Envelopes are also enclosed for the adult Catawbas to send their agreement forms either to the Chief or the Superintendent.

We have not as yet received printed copies of the act but we are doing everything possible to get them to you as soon as we can.

Sincerely yours,

/s/ Peter F. Walz
Program Officer

Copy to: Surname
Chrony
Mailroom
Holdup
M Matheson

PFWalz:bap 11-17-59



Date _____

*AGREEMENT*

To accept the terms of Public Law 86-322 for a division of Catawba tribal assets.

I, _____, an adult member of the Catawba Tribe, hereby certify that I have received a copy of the Act of September 21, 1959, Public Law 86-322 whereby the assets of the Catawba Tribe will be divided among the tribal members, and I agree that the assets should be distributed according to the terms of the Act. I further agree that the terms of the Act shall apply to me as an individual and the Catabaws as a tribe.

_____
Signed

Witness

_____

_____

Explanation of the act to provide for the division of the tribal assets of the Catawba Indian Tribe of South Carolina among the members of the tribe (Public Law 86-322, 86th Congress, H.R. 6128, September 21, 1959).

The act provides for the closing of the membership roll and the distribution of all tribal property among the members who are listed on this roll (or heirs of deceased members) in approximately equal shares.

The first section creates the procedure to be used in the preparation, approval, and closing of the Catawba Indian tribal roll.

Section 2 provides that each living member or the estate of a deceased member will get an equal share of the tribe's property.

Section 3 contains the provisions for dividing tribal assets as follows:

(a) It authorizes the State of South Carolina, if it wishes, to divide up the Catawba land held by it, under the terms of this law.

(b) It permits the tribal council to say what part of the tribe's land may be set aside for church, park, playground, or cemetery purposes. These parcels may be turned over to trustees selected by the tribal council.

(c) The rest of the tribal land must be appraised by the Secretary, and the appraised value of each member's share is this total amount divided by the number of members. The appraisal will not include any buildings or other improvements made on an assignment which is selected by an assignee or his wife or children as provided in the next paragraph, since such improvements belong to the assignee.

(d) Each adult who has an assignment has a choice of getting any part of the assignment that is valued at not more than the value of his share of the tribe's assets. In addition, the same applies to the wife, husband, or children, of that adult. Selections for children may be



made by the adult. All selections must be approved by the Secretary.

(e) After selections have been made as provided above, each member who has no assignment may select any part of the remaining tribal land up to the appraised value of his share.

(f) All property of the tribe not chosen by members is to be sold and the money distributed to those who have not chosen their full share in land. The land sales are to be by competitive bid and all members have the right to buy the property at the same price as the highest acceptable bid. Property not sold within two years is to be turned over to a trustee for sale.

Section 4 authorizes the Secretary to make land surveys and issue deeds and other necessary documents to give good unrestricted title to the grantees or purchasers.

Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes," so the individual members will no longer be subject to laws which apply only to Indians. Nothing in the act prohibits those interested in organizing under State law to carry on any of the nongovernmental activities of the group.

Section 6. Nothing in this act shall affect the rights, privileges or obligations of the tribe and its members under the laws of South Carolina.

Section 7 provides that the actual distribution of any property under this act will not be taxed, but this does not mean that the property or income therefrom will not be taxed thereafter. After the distribution, the usual State and Federal taxes will apply.

Section 8 provides for special educational and vocational training for the Catawbas while this law is being carried out.

November 16, 1959

**DEF. EX. 35**

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D.C.

May 29, 1962

Dear Mr. Sanders:

Section 5 of the Act of September 21, 1959 (73 Stat. 592), directs me to revoke the Constitution and Bylaws of the Catawba Indian Tribe of South Carolina which was approved by Oscar L. Chapman, the Assistant Secretary of the Interior, on June 30, 1944. The date of revocation marks the termination of the legal relationship that exists between the Catawbas as a tribe and the individual members as Indians, and the United States Government.

Section 3(f) of the Act provides for a period of two years to distribute the assets and also provides for the disposition of those assets not conveyed to members. This two-year period began on the date a notice was published in the Federal Register that a majority of the adult Catawbas had accepted the terms of the Act; 25 F. R. 6305, July 2, 1960, and ends on July 1, 1962. The date or revocation will be made to correspond to the end of the two-year period.

Pursuant to the cited authority I hereby declare the Constitution and Bylaws of the Catawba Indian Tribe of South Carolina, revoked as of July 1, 1962; together with all ordinances, resolutions, codes and regulations promulgated under said Constitution. Also, in accordance with further provisions of Section 5 of the Act, that as of July 2, 1962, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as In-



dians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.

There is enclosed a statement that is also being sent to the State of South Carolina which gives notice that the Memorandum of Understanding entered into by the State of South Carolina, the Catawba Tribe and the Bureau of Indian Affairs on December 14, 1943, has been rendered ineffectual by the Act of September 21, 1959, *supra*, insofar as the Federal Government is concerned.

Sincerely yours,

/s/ John A. Carver, Jr.
Secretary of the Interior

Mr. Albert E. Sanders, Sr.
Chief, Catawba Indian Tribe of
South Carolina
Route 3, Box 136
Rock Hill, South Carolina.

**DEF. EX. 36**

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D.C.

*Jun. 15, 1962*

Dear Governor Hollings:

The enclosed notice is issued in order that all of the Federal actions directed by the Act of September 21, 1959 (73 Stat. 592), may be completed. We are sending an identical notice to the Catawba Indian Tribe of South Carolina. The Constitution and Bylaws of the Catawba Tribe will be revoked as of July 1, 1962.

Sincerely yours,

/s/ John A. Carver, Jr.
Secretary of the Interior

Hon. Ernest F. Hollings
Governor of South Carolina
Columbia, South Carolina

Enclosure

cc:
Mr. Albert H. Sanders, Sr.
Mr. Arthur H. Arntson

Sec. Surname
Sec. Reading File
BIA Surname
Prog. Chron.
Mailroom
PFWalz:nl 4/32/62



*NOTICE*

Whereas, the Act of September 21, 1959 (73 Stat. 592), provides that special services performed by the United States for Catawba Indians because of their status as Indians shall be terminated on the date of revocation of the tribe's constitution; and

Whereas, the Bureau of Indian Affairs has performed services to the Catawba Indians pursuant to a Memorandum of Understanding entered into with the Tribe and the State of South Carolina on December 14, 1943; and

Whereas such Memorandum of Understanding is to be rendered ineffectual by the Act of September 21, 1959, *supra*, and since no term was agreed upon in the Memorandum of Understanding,

Now therefore, the Secretary of the United States Department of the Interior hereby gives notice of intention to withdraw and conclude the Department's responsibilities under the agreement approved December 14, 1943. The effective date of withdrawal shall be July 1, 1962.

/s/ John A. Carver, Jr.
Secretary of the Interior

**DEF. EX. 39**

April 1, 1981

Patricia Simmons—343-4045
Branch of Tribal Relations

## INDIAN TRIBES TERMINATED FROM FEDERAL SUPERVISION

Alabama and Coushatta Tribes of Texas
Act of August 23, 1954 (68 Stat. 768)

Catawba Indian Tribe of South Carolina
Act of September 21, 1959 (73 Stat. 592)

Klamath and Modoc and Yahooskin Band of Snake Indians of the Klamath Reservation
Act of August 13, 1954 (68 Stat. 718)

Ponca Tribe of Nebraska
Act of September 5, 1962 (76 Stat. 619)

Mixed Blood Ute Indians of the Uintah and Ouray Indians of Utah (aka Affiliated Ute Citizens of the Uintah and Ouray Reservation)
Act of August 27, 1954 (68 Stat. 868)

California Indian Rancherias
Act of August 18, 1958 (72 Stat. 619)

Alexander Valley
Auburn
Big Valley
Blue Lake
Buena Vista
Cache Creek
Chicken Ranch
Chico (Meechupta)
Cloverdale
Colfax
Crescent City (Elk Valley)
Graton (Sebastopol)
Greenville
Guidiville
Indian Ranch
Likely
Lookout (West)
Lytton
Mark West
Mission Creek



Mooretown
Nevada City
North Fork
Paskenta
Picayune
Pinoleville
Potter Valley
Quartz Valley
Redding (Clear Lake)
Redwood Valley
Rohnerville (Bear River)
Ruffeys (Ruffeys Valley-Etna Band)
Scotts Valley (Sugar Bowl)
Shingle Springs (El Dorado Tract)
Smith River
Strathmore
Strawberry Valley
Table Bluff
Taylorsville
Wilton

Western Oregon Indians: Tribes and Band of Western Oregon including the following tribes, bands, groups or communities in Oregon. Act of August 13, 1954 (68 Stat. 724)

Confederated Tribes of the Grand Rhonde Community

Alsea
Applegate Creek
Calapooya
Chaftan
Chempho
Chetco
Chetlessington
Chinook
Clackamas
Clatskanie
Clatsop
Clowwewalla
Coos
Cow Creek
Euchees
Galic Greek
Grave
Joshua
Karok
Kathlamet
Kusotony
Kwatami or Sixes
Lakmiut
Long Tom Creek
Lower Coquille
Lower Umpqua
Maddy
Mackanotin
Mary's River
Multnomah
Munsel Creek
Naltunnetunne
Nehalem
Nestucca
Northern Mallalla
Port Oxford

Pudding River
Rogue River
Salmon River
Santiam
Scoton
Shasta
Shasta Costa
Siletz
Siuslaw
Skiloot
Southern Molalla
Takelma
Tillamook
Tolowa
Tualatin
Tututui
Upper Coquille
Upper Umpqua
Willamette
Tumwater
Yamhill
Yaquina
Yoncalla



## TERMINATED TRIBES RESTORED TO FEDERAL STATUS

Menominee Tribe of Wisconsin
Terminated by Act of June 17, 1954 (68 Stat. 250)
Restored by Act of December 22, 1973 (87 Stat. 770)

Ottawa Tribe of Oklahoma
Terminated by Act of August 3, 1956 (70 Stat. 963)
Restored by Act of January 19, 1978

Peoria Tribe of Oklahoma
Terminated by Act of August 2, 1956 (70 Stat. 937)
Restored by Act of January 19, 1978

Wyandotte Tribe of Oklahoma
Terminated by Act of August 1, 1956 (70 Stat. 893)
Restored by Act of January 19, 1978

Confederated Tribes of Siletz Indians of Oregon
Terminated by Act of August 13, 1954 (68 Stat. 724)
Restored by Act of November 18, 1977 (91 Stat. 1415)

Paiute Indian Tribe of Utah
Terminated by Act of September 1, 1954 (68 Stat. 1099)
Restored by Act of April 3, 1980 (94 Stat. 317).

**EX. A**

[SEAL]

In reply refer to:
F-60-1033-9

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
Washington, 25, D.C.

July 22, 1960

Memorandum

To: Commission

From: The Solicitor

Subject: Memorandum of Understanding between State of South Carolina, Catawba Tribe and the Bureau of Indian Affairs

This refers to your memorandum of July 5, 1960, requesting advice as to whether a formal cancellation of the subject Memorandum of Understanding should be executed. We agree with your view that although the Memorandum of Understanding is not specifically mentioned in the recent termination legislation the federal government will not be bound by the terms of the agreement after the termination date.

The legislative history of the Act of September 21, 1959, 73 Stat. 592, clearly shows that the existence of such agreement was known to the Congress and that the Bureau services to be discontinued under the act were those covered by the subject Memorandum of Understanding. Further, the property to be distributed under the act *supra* is that which was conveyed to the United States in trust for the Catawba Indians pursuant to the 1943 Memorandum of Understanding. H Rept. 86th Cong. 1st Sess.

In view of these factors, it is our opinion that a formal cancellation of the document is not necessary. However,



to tie up all the loose ends, you may wish to request that the Secretary or his authorized representative submit a concluding document to the State of South Carolina and to the Catawba Tribe prior to the termination date. Such document might provide:

"Whereas, the Act of September 21, 1959, 73 Stat. 592, provides that special services performed by the United States for Catawba Indians because of their status as Indians shall be terminated on the date of revocation of the tribe's constitution; and

"Whereas, the Bureau of Indian Affairs has performed services to the Catawba Indians pursuant to a Memorandum of Understanding entered into with the Tribe and the State of South Carolina on December 14, 1943; and

"Whereas such Memorandum of Understanding is to be rendered ineffectual by the Act of September 21, 1959 *supra* and since no term was agreed upon in the Memorandum of Understanding,

"Now therefore, the Commissioner of Indian Affairs (Secretary) of the United States Department of the Interior hereby gives notice of intention to withdraw from and conclude the Department's responsibilities under the agreement approved December 14, 1943.

"The effective date of withdrawal shall be the date upon which the Constitution of the Catawba Tribe of Indians is revoked pursuant to section 6 of the Act of September 21, 1959, 73 Stat. 592."

GEORGE W. ABBOTT
The Solicitor

By: /s/ Franklin C. Salisbury
FRANKLIN C. SALISBURY
Assistant Solicitor
Indian Legal Activities

(9)

No. 84-782

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF PETITIONERS

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

J.D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, S.C. 29602
(803) 242-6440
*Attorneys for C.H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, S.C. 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

JAMES D. ST. CLAIR *
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, Mass. 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
STATE OF SOUTH CAROLINA
Rembert Dennis Building
Columbia, S.C. 29211
(803) 758-3970
*Attorneys for the State of South Carolina*

* Counsel Of Record For Each Petitioner

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## QUESTIONS PRESENTED

Whether a four-to-three majority of the Fourth Circuit Court of Appeals erred in holding:

(1) That the Catawba Indians are immune from state statutes of limitations even though a 1959 federal statute terminated any trust relationship between the Catawbas and the United States and explicitly provides that "the laws of the several states shall apply to them in the same manner they apply to other persons?"

(2) That the Catawba Indians may claim a special legal status under federal law—which would bind the United States as their trustee, permit them to act as a sovereign entity, and enable them to assert a claim that accrued 140 years before the filing of the complaint—even though a 1959 federal statute explicitly provides that "the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians" and provides that federal Indian statutes "shall not apply to them?"

## PARTIES IN THE COURT OF APPEALS

Seventy-six named defendants [1] are alleged to represent a defendant class of 27,000 current landowners.[2] The

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[1] The named defendants are the State of South Carolina, Richard W. Riley as Governor of the State of South Carolina; County of Lancaster, and its County Council consisting of Francis L. Bell as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus; City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gill, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr.; Bowater Carolina Company, Division of Bowater Incorporated; Catawba Timber Co.; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Cresent Land & Timber Corp.; Duke Power Company; Flint Realty and Construction Company; Herald Publishing Company; Home Federal Savings and Loan Association; Rock Hill Printing & Finishing Company; Roddey Estates, Inc.; Southern Railway Company; Springs Mills, Inc.; J.P. Stevens & Company; Tega Cay Associates; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; Nisbet Farms, Inc.; C.H. Albright, Ned Albright; J.W. Anderson, Jr., John Marshall Walker II, Jesse G. Anderson, John Wesley Anderson, David Goode Anderson; W.B. Ardrey, Jr., Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; W. Watson Barron, Wilson Barron; Archie B. Carrol, Jr.; Hugh William Close, James Bradley, Francis Lay Springs, Lillian Crandall Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr.; Robert A. Fewell; W.J. Harris, Annie F. Harris; T.W. Hutchinson, Hiram Hutchinson, Jr.; J.R. McAlhaney; F.M. Mack, Jr.; Arnold F. Marshall; J.E. Marshall, Jr.; C.D. Reid, Jr.; Will R. Simpson, John S. Simpson, Robert F. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshall E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Good, R.N. Bencher, W.O. Nisbet III; Pauline B. Gunter; J. Max Hinson; W.A. McCorkle, Mary McCorkle; William O. Nisbet; Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin; Robert M. Yoder.

[2] A motion to certify the alleged class was filed, but the district court stayed consideration of it pending the ruling on defendants' motion to dismiss or for summary judgment. The district court dismissed the action without deciding the motion for class certification.



named defendants include individuals, a family trust, a religious organization, private companies, local government organizations and the State of South Carolina. The plaintiff is The Catawba Indian Tribe, Inc., a non-profit organization incorporated in 1975 under South Carolina law, and operated by persons claiming to be descendants of Catawba Indians.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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No. 84-782

STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF OF PETITIONERS

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### OPINIONS BELOW

The decision of the United States District Court for the District of South Carolina (the Honorable Joseph P. Willson sitting by designation of the Chief Justice) is unreported but appears in the Appendix to the Petition for Certiorari ("Pet. App.") at 35a-53a. The single paragraph *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, is reported at 740 F.2d 305 (4th Cir. 1984), together with a concurring opinion. Pet. App. at 1a-3a, 29a-34a. The majority and the dissenting opinions of the original three-judge panel, adopted respectively by the majority and minority of the court of appeals sitting *en banc*, are reported at 718 F.2d 1291-1303 (4th Cir. 1983). Pet. App. at 4a-28a.

## JURISDICTION

This Court has jurisdiction to review the final decision of the court of appeals under 28 U.S.C. § 1254(1) (1982), pursuant to a timely-filed Petition for Writ of Certiorari which was granted June 3, 1985.

## STATUTE TO BE CONSTRUED

The decision below required the construction of a 1959 act of Congress, Public Law 86-322 (Sept. 21, 1959), 73 Stat. 592 (1959), 25 U.S.C. §§ 931-938 (1982). Pet. App. at 54a-59a. Section 5, the principal focus of analysis provides:

> The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

73 Stat. at 593.

## STATEMENT OF THE CASE

### I. The Parties And The Land In Issue.

The Catawba Indian Tribe, Inc. is a non-profit organization incorporated in 1975 under South Carolina law and operated by persons claiming to be descendants of Catawba Indians ("the Catawbas" or "the respondent"). The respondent claims the current right to own and possess approximately 144,000 acres (225 square miles) of land at the northern border of South Carolina in York,



Lancaster, and, perhaps, Chester Counties, and seeks trespass damages from 1840 to the present.

The land in issue encompasses the city of Rock Hill, the town of Fort Mill and a number of smaller communities. Thousands of families, as well as small businesses, farms, trusts, lending institutions, manufacturers, churches, charitable organizations, local governments and the State of South Carolina, currently hold record title to or other interests in that land. Seventy-six individuals, companies and public entities are named as defendants ("the current landowners" or "the petitioners") and as representatives of an uncertified putative defendant class alleged to consist of 27,000 "persons who assert an interest in any portion of the subject lands." [1]

### II. The Nature Of The Claim.

The Catawbas claim that their ancestors occupied the land in issue "from time immemorial" and that their ownership was recognized and confirmed by treaties with Great Britain in 1760 and 1763.[2] Neither the 1760 nor the 1763 treaty prohibited the Catawbas from transferring their interest in the land in issue.[3] In 1840, the Catawbas voluntarily transferred any interest they held in that land to the State of South Carolina by the Treaty of Nation Ford.[4] In return, the 1840 treaty provided

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[1] Complaint ¶ 8 (R. Vol. I, N.R. 1). (J.A. 20).

[2] Complaint ¶¶ 4, 12-14 (R. Vol. I, N.R. 1) (J.A. 19, 21-22). The United States, however, has never entered into any treaty with the Catawbas.

[3] No copy of the 1760 treaty has been discovered by the parties, but the respondent does not suggest that any provision of that treaty has been violated. Nothing in the 1763 treaty prohibited the Catawbas from alienating the land referred to in the treaty or prohibited any person from acquiring that land. Treaty of Augusta, November 10, 1763, Colonial Records of North Carolina, XI at 199 (R. Vol. V-VI, Ex. 6) (J.A. 32).

[4] The 1840 Treaty of Nation Ford (R. Vol. V-VI, Ex. 12) (J.A. 38). Well before the 1840 treaty, the Catawbas had leased their

that the state should purchase new land for the Catawbas in a less populated region and should make monetary payments to them over the span of ten years.[5]

The Catawbas nevertheless contend that they can void their ancestors' voluntary transfer of their interest in this land because federal approval of or consent to the 1840 transfer was required by a federal statute known as the Nonintercourse Act[6] and such approval or consent allegedly was lacking. According to the Catawbas, that alleged lack of federal approval or consent is sufficient to destroy the titles of the 27,000 landowners who trace their titles to the State of South Carolina.

### III. The Catawba Termination Act And The Decisions Below.

In 1959, during a period when the declared goal of federal Indian policy was to end the segregation of Indians from the rest of society,[7] Congress enacted a statute commonly referred to as the Catawba termination act, 73 Stat. 592 (1959), 25 U.S.C. §§ 931-938 (1982). That act explicitly declares that state law shall apply to the Catawbas, that all federal Indian statutes shall not apply to the Catawbas, and that special federal services for

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interest to non-Indians under long-term leases and had ceased to occupy the land in dispute. (R. Vol. V-VI, Ex. 38).

[5] *Id.* In 1842 the State of South Carolina purchased land for the Catawbas which the state continues to hold for them. The district court's opinion describes more fully the relevant history that was assumed to be accurate and was not disputed solely for purposes of summary judgment. *See* Pet. App. at 41a-46a.

[6] The 1834 Nonintercourse Act is presently codified at 25 U.S.C. § 177 (1982). This Court recently held in County of Oneida v. Oneida Indian Nation (*"Oneida II"*), —— U.S. ——, 53 U.S.L.W. 4225, 4229 (March 4, 1985) that the Nonintercourse Act merely codified existing common law restraints on alienation of Indian land.

[7] *See* below at 9-11.



Indians shall not be available to the Catawbas.[8] The Catawbas nevertheless maintain that they may challenge the validity of the 1840 transaction because they contend that state laws barring such stale claims do not apply to them and that they have special federal status and privileges.

The district court held that the Catawba termination act had profoundly changed the Catawbas' status under federal law, and, as a result, that their claim is now barred for several independent and alternative reasons.[9] Because the termination act plainly provides that state law shall apply to the Catawbas, and because the termination act ended any trust relationship between the Catawbas and the federal government that might preempt the application of state law to them, the district court concluded that the act made state law applicable to the Catawbas on its effective date, July 1, 1962. Pet. App. at 48a. As a consequence, the district court ruled that the ten-year South Carolina statute of limitations began to run once the termination act became effective and that it had expired before the Catawbas brought this action in 1980. Pet. App. at 49a.

Based on the revocation of the Catawbas' tribal constitution and legislative history confirming that after termination Congress did not intend to treat the Catawbas as a tribe under federal law, the district court alternatively held that the termination act ended any legal status the Catawbas may have had as a tribe or governmental entity. For this additional reason, the district court concluded that the Catawbas could not prevail. Pet. App. at 51a.

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[8] *See* Section 5 of the Catawba termination act, 25 U.S.C. § 935, quoted in relevant part above at 2.

[9] Accordingly, the district court held that it was not necessary to resolve the many disputed historical facts raised by the respondent's claim to determine the Catawbas' *current* legal status. *See* the description of the proceedings below, Pet. App. at 4-7, and the district court opinion, Pet. App. at 35a-53a.

In a decision described by the Solicitor General as "clearly wrong," [10] a four-judge majority of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed. The *en banc* majority adopted the panel's majority ruling that the Catawba termination act "neither prohibits nor authorizes the application of state law to bar the Tribe's reservation claim," and that the act "did not end the trust relationship between the Tribe and the federal government." Pet. App. at 18a-19a, 23a. As a result, the majority refused to apply the state statute of limitations. The majority further ruled, largely because the State of South Carolina still holds land for the Catawbas, that the Catawbas must be treated as a tribe for purposes of federal law. Pet. App. at 18a. Three judges of the court of appeals dissented, declaring that the majority had "nullif[ied] the clear mandate of the Catawba Act." Pet. App. at 28a.

## SUMMARY OF ARGUMENT

Pursuant to a clearly expressed policy of determining which Indians were prepared for independence from paternalistic federal programs and ending any special status under federal law they may previously have held, and with the manifest intent of making the Catawbas the same as other citizens of South Carolina, in 1959 Congress enacted a statute terminating any special Indian relationship between the United States and the Catawbas and explicitly directing that state law apply to the Catawbas in the same manner as to other persons and citizens. The language of the statute is clear. Moreover, legislative history and contemporaneous and current administrative interpretation confirm that Congress intended to terminate all aspects of any trust relationship

[10] Brief For the United States As Amicus Curiae (in support of petition for certiorari) ("U.S. Brief") at 16. Indeed, the Solicitor General urged the Court to review the majority decision below in part because of the degree of error committed by the majority. U.S. Brief at 18-19.



between the Catawbas and the United States and all vestiges of federal restraints on them based on their status as Indians.

As a consequence of Congress's decision to make state law applicable to the Catawbas and to terminate any special federal status, the Catawbas and any asserted property rights they held became subject to state law. A ten-year statute of limitations began to run on their claim once the termination act became effective and it expired long before they filed this action. This claim is now barred.

In addition, although the act did not preclude the Catawbas from voluntarily associating as an organization under state law, it eliminated any status they may have held as a "tribe" under federal law for purposes of the application of federal statutes such as the Nonintercourse Act. Because a present, historical and continuous tribal status under federal law is an essential element of this claim, the respondent cannot, as a matter of law, prevail.

## ARGUMENT

### I. The Catawba Termination Act Profoundly Changed The Catawbas' Legal Status By Terminating Any Special Status Under Federal Law And Explicitly Directing That State Law Shall Apply To The Catawbas.

#### A. *The Catawba Termination Act Was One Of A Dozen Termination Acts Passed Pursuant To A Declared Policy Of Completely Ending The Special Status Of Indians Under Federal Law.*

Pursuant to the Constitution's commitment to the federal government of paramount authority over Indian affairs,[11] the United States has plenary power to alter

[11] U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . with the Indian Tribes"). *E.g.*, Nat'l Farmers Union Ins. Co. v. Crow Indian Tribe, —— U.S. ——, 105 S.Ct. 2447 (1985).

the status of Indians and Indian tribes under federal law and to end completely any supervisory or trust responsibility for them.[12] As this Court declared in *United States* v. *Waller*:

> Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection.[13]

The need for supervision and protection has not always persisted. Accordingly, Congress has exercised its plenary power by making state law partially or wholly applicable to Indians and Indian tribes,[14] granting leases and rights of way across Indian lands,[15] dissolving Indian reservations,[16] disposing of Indian property (even without the

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[12] *See, e.g.*, United States v. Nice, 241 U.S. 591, 598 (1916); Marchie Tiger v. West. Inv. Co., 221 U.S. 286 (1911).

[13] United States v. Waller, 243 U.S. 452, 459-60 (1917). *See also* Affiliated Ute Citizens v. United States (*"Affiliated Ute"*), 406 U.S. 128, 149-50 (1972) (terminated Indians required to challenge allegedly fraudulent transfers of their property under the same laws as non-Indians).

[14] *See, e.g.*, Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) (congressional authorization of state jurisdiction permitted assumption of partial state jurisdiction over Indian reservations even without Indian consent); Dickson v. Luck Land Co., 242 U.S. 371, 375 (1917) (Congress intended state law regarding property transfers to apply to Indian land under act directing that Indians "shall have the benefit of and be subject to the laws, both civil and criminal, of the State"); United States v. City of McAlester, 604 F.2d 42, 52 (10th Cir. 1979) (*en banc*) (Curtis Act of 1898 held to allow Indian land to be taken in condemnation proceeding pursuant to state law).

[15] Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Cherokee Nation v. Southern Kans. Ry. Co., 135 U.S. 641 (1890).



consent of the Indians),[17] and terminating tribal status under federal law.[18]

During the early 1950's Congress adopted a policy of ending the special status of Indians under federal law, because that special status unacceptably segregated Indians from equal participation in the broader society.[19] The policy of ending the special status of Indians under federal law and permitting their participation in the mainstream of society on an equal basis with other citizens, became known as "termination," the acts implementing the policy as "termination acts," and the years from the early fifties through the late sixties as the "termination period."[20]

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[16] DeCoteau v. District County Court, 420 U.S. 425 (1975).

[17] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). *See generally* Shoshone Tribe v. United States, 299 U.S. 476 (1937). The Court recently noted in Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, —— U.S. ——, 105 S.Ct. 2587, 2595 n.22 (1985), for instance, that Congress had authorized the condemnation of Pueblo lands where Pueblos had refused to make voluntary conveyances of easements to utilities and common carriers.

[18] Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); United States v. Wheeler, 435 U.S. 313, 323 (1978).

[19] In 1952 the House Interior and Insular Affairs Committee declared that perpetuation of any special status for Indians was undesirable:

> It is the belief of the committee that all legislation dealing with Indian affairs should be directed to the ending of a segregated race set aside from other citizens. It is the recommended policy of this committee that the Indians be assimilated into the Nation's social and economic life. The objectives, in bringing about the ending of the Indian segregation to which this committee has worked and recommends are: (1) the end of wardship or trust status as not acceptable to our American way of life, and (2) the assumption by individual Indians of all the duties, obligations, and privileges of free citizens. The committee realizes that these objectives cannot be accomplished "overnight," but recommends a constant effort in that direction,

The central purpose of termination legislation was to make state law, not federal law, apply to Indians and to end completely any special status held by Indians under federal law. One commentator succinctly described termination in a report to Congress:

> Termination, the official Federal Indian Policy from 1953 through the late 1960's may be defined simply as the cessation of the Federal-Indian relationship, whether that relationship was established through treaty or otherwise. *The thrust was to eliminate the reservations and to turn Indian affairs over to the states. Indians would become subject to state control* without any Federal support or restrictions. Indian land would no longer be held in trust and would be fully taxable and alienable, just like non-Indian land in the states.[21]

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with careful and earnest consideration always given to the rights of the Indians.

H.R. Rep. No. 2503, 82d Cong., 2d Sess. 124 (1952) (R. Vol. III, Ex. 4) (J.A. 67).

On August 1, 1953 Congress passed House Concurrent Resolution 108. That resolution declared Congress's intent to make Indians subject to the same laws as other persons and to end any special status they might have had under federal law:

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship. . . .

H.R. Con. Res. 108, 67 Stat. B132 (1953) (R. Vol. III, Ex. 3) (J.A. 53).

[20] *E.g.*, Wilkinson, The Passage of the Termination Legislation, *in* Final Report To The American Indian Policy Review Comm'n, *in* Task Force Ten, *Report on Terminated and Nonfederally Recognized Indians*, 1627-49 (October 1976) (U.S. Gov't Printing Office).

[21] *Id.* at 1627 (footnote omitted) (emphasis supplied).



Senator Watkins, Chairman of the Senate Subcommittee on Indan Affairs, described the purpose of termination legislation:

> We do not want the Government still in the [Indian] business by any implication whatsoever. If we have severed the cord which binds us to the Indians or the Indians to us, we want it completely severed, and not just a little strand left.[22]

Pursuant to this policy and as a result of studies begun as early as 1953,[23] a dozen termination acts affecting approximately 100 tribes, bands and rancherias were passed between 1954 and 1962.[24]

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[22] *Joint Hearings on S. 2745 and H.R. 7320 Before the House and Senate Subcommittee of the Committees on Interior and Insular Affairs*, 83d Cong., 2d Sess. 250 (1954) (R. Vol. III, Ex. 7). Seven years later when Menominee Indians attempted to forestall the termination of the trust relationship, other members of Congress were similarly unequivocal in stating their understanding of termination. Senator Anderson remarked, "Termination is a single term . . . . I am sure termination means termination and not continuance." Senator Church added, "An end is an end is an end." *Hearings on S. 869 and S. 870 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 87th Cong., 2d Sess. 18 (1961) (R. Vol. III, Ex. 9).

[23] In the spring of 1953, the House of Representatives directed the Committee on Interior and Insular Affairs to study the Bureau of Indian Affairs' ("BIA's") performance with respect to termination and to report a list of the Indian groups ready for immediate termination of federal supervision and responsibility. H.R. Res. 89, 83d Cong., 1st Sess. (1953) (R. Vol. III, Ex. 5) (J.A. 73-74).

[24] Enacted termination statutes are listed in alphabetical order by the name of the terminated Indian group:

Alabama-Coushatta, 25 U.S.C. §§ 721-728, 68 Stat. 769 (1954); California Rancheria, 72 Stat. 619 (1958); Catawba, 25 U.S.C. §§ 931-938, 73 Stat. 592 (1959); Klamath, 25 U.S.C. §§ 564-564x, 68 Stat. 718 (1954); Menominee, 25 U.S.C. §§ 891-902, 68 Stat. 250 (1954); Mixed-Blood Ute, 25 U.S.C. §§ 677-677aa, 68 Stat. 878 (1954); Ottawa, 25 U.S.C. §§ 841-853, 70 Stat. 963 (1956); Peoria, 25 U.S.C. §§ 821-826, 70 Stat. 937 (1956); Ponca, 25 U.S.C. §§ 971-980, 76 Stat. 429 (1962); Southern Paiute, 25 U.S.C. §§ 741-760,

### B. *The Catawba Act Was Viewed By Congress, The Catawbas, And The BIA As Completely Terminating Any Special Status Under Federal Law.*

In September 1954, after a Bureau of Indian Affairs ("BIA") study, a special House Study Subcommittee on Indian Affairs reported that the Catawbas were among the Indian groups able to manage their own affairs and ready for termination.[25] The Subcommittee further recommended that steps be taken to discontinue BIA operations in South Carolina.[26]

Throughout the mid-fifties the Catawbas remained among the groups the BIA considered ready for termination.[27] In a June 21, 1957 letter responding to an inquiry about federal responsibility for the Catawbas, Acting Commissioner of Indian Affairs H. Rex Lee wrote that:

> We have surveyed the general situation at Catawba on a number of occasions over the past two years,

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68 Stat. 1099 (1954); Western Oregon, 25 U.S.C. §§ 691-708, 68 Stat. 724 (1954); Wyandotte, 25 U.S.C. §§ 791-807, 70 Stat. 893 (1956). Hereinafter only citations to the United States Code will be used.

[25] H.R. Rep. No. 2680, 83d Cong., 2d Sess. 2-3 (1954) (R. Vol. III, Ex. 6) (J.A. 82-3). The Department of the Interior reported in 1959 that the Catawbas "have advanced economically at a steady pace during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors in the community." H.R. Rep. No. 910, 86th Cong., 1st Sess. *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2674 (R. Vol. III, Ex. 25) (J.A. 124-25). At the time of the Catawba termination act, there were 162 Catawba families but there were 120 non-Indian spouses in those families. Approximately 79 of those families lived in Rock Hill and other non-Indian communities. R. Vol. III, Ex. 26 (J.A. 131).

[26] H.R. Rep. No. 2680, 83d Cong., 2d Sess. 4 (1954) (R. Vol. III, Ex. 6) (J.A. 86).

[27] BIA "Revised Summary Statement of Withdrawal as of December 31, 1955" (R. Vol. III, Ex. 11). Letter to South Carolina Congressman J.P. Richards from the Commissioner of Indian Affairs Glenn Emmons (June 13, 1956) (R. Vol. III, Ex. 12).



> and have come to the conclusion that their degree of adjustment and attainment in the community is such that we should work out plans with them for an early relinquishment of *all* restrictions over their property and affairs; *thus terminating any special relationship of the Catawbas to the Federal Government under trusteeship.*[28]

The Catawbas, the State of South Carolina and the BIA began preparing for termination.[29]

These activities resulted in a January 3, 1959 resolution by the Catawbas requesting South Carolina Congressman Robert Hemphill to secure the passage of legislation which would end their communal ownership of land and distribute to them as individuals 3400 acres, remove severe restraints on alienation of their land, and permit the Catawbas to obtain the credit necessary to build homes and improve their property.[30] The adoption of that resolution began the process of giving the Catawbas the same status as other citizens of South Carolina.

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[28] R. Vol. III, Ex. 13 (emphasis supplied).

[29] In 1958 the State of South Carolina established a legislative commission to study the Catawbas' situation with a view to the enactment of termination legislation. At the request of South Carolina Congressman Robert Hemphill, a BIA Program Officer investigated whether the Catawbas were ready and willing to be terminated. Both the Program Officer and the state legislative commission met with tribal trustees and other Catawbas to discuss the proposal. Letter from Commissioner of Indian Affairs Glenn Emmons, to Congressman Hemphill (June 13, 1958) (R. Vol. III, Ex. 14). Letter from H. Rex Lee, Acting Commissioner of Indian Affairs, to Congressman Hemphill (August 22, 1958) (R. Vol. III, Ex. 15). Memorandum from Program Officer Bitney to BIA Chief, Branch of Tribal Programs (October 31, 1958) (R. Vol. III, Ex. 16).

[30] Resolution of Catawba Tribe of Indians (January 3, 1959) (R. Vol. III, Ex. 17) (J.A. 102-03). Letter to the Commissioner of Indian Affairs from Superintendent Butts of the Cherokee agency responsible for the Catawbas during the period of the Memorandum of Understanding (January 26, 1956) (R. Vol. III, Ex. 18) (J.A. 104-05).

Congressman Hemphill promptly had a bill drafted and met with the Catawbas on March 28, 1959 to explain it. According to the BIA Chief of Tribal Programs, who also attended the meeting, one of the purposes of the proposed legislation was "to terminate Federal responsibility to the tribe and its individual members." [31] Several Catawbas asked at the meeting whether the proposed legislation could be drafted to allow some Catawbas "to withdraw from Federal Supervision" and others to elect "to remain under Federal supervision." They mentioned the Klamath termination act [32] as an example of such partial termination. Congressman Hemphill responded that unless there was a "clear majority" for the bill as then drafted, providing for complete termination, he would not press for its enactment.[33] At the conclusion of that meeting a secret ballot was held, and the Catawbas again voted for termination.[34]

Congressman Hemphill then introduced H.R. 6128,[35] and the House Subcommittee on Indian Affairs held hearings on July 10, July 27, August 7 and August 12, 1959. Congressman Hemphill stated:

> They need it [the legislation] to put them on the *same status as other citizens* with the same responsibilities.[36]

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[31] Memorandum from Homer B. Jenkins to H. Rex Lee, Associate Commissioner of Indian Affairs (March 31, 1959) (R. Vol. III, Ex. 20).

[32] 25 U.S.C. §§ 564-564x.

[33] Minutes of the Special Meeting of the Catawba Council held at the Catawba Indian School on Saturday, March 28, 1959 (minutes taken by a BIA assistant accompanying BIA Superintendent Butts) (R. Vol. III, Ex. 19) (J.A. 110-15).

[34] *Id.*

[35] 105 Cong. Rec. 5466 (1959) (R. Vol. III, Ex. 21). *See* H.R. 6128, 86th Cong., 1st Sess. (1959).

[36] The bill, H.R. 6128, was the subject of two days of public hearings before the Subcommittee on Indian Affairs of the House Committee on the Interior and Insular Affairs (July 10, 1959 and July 27, 1959), one meeting in the Executive Session of that Subcommittee (August 7, 1959), and one meeting in the full Committee (August 12, 1959). Transcripts of these hearings and congressional committee meetings are available for review (but not copying) through the House Committee on Interior and Insular Affairs. Verbatim excerpts were quoted in the briefs filed in the courts below. Such excerpts are cited here by the date of the transcript and the page where they appear. July 10, 1959, Hearing Transcript ("H.Tr.") at 10 (emphasis supplied).



Other Congressmen similarly stressed throughout the proceedings that the Catawbas would hold the same status as other persons after the legislation became effective. Subcommittee Chairman Haley remarked, for instance:

> Of course, if this bill is passed, in so far as the Federal Government is concerned the Indian will just be a citizen and he will receive no additional public service . . . .[37]

Committee Chairman Aspinall rejected the idea that any special federal status could linger:

> I am not so sure that we are doing anything for the Indian Tribe at all if, in one movement, we take away Federal control, Federal jurisdiction, and then in another at the same time we go ahead and give them special privileges.[38]

The Department of the Interior and its Bureau of Indian Affairs expressed their support of H.R. 6128, describing it as:

> a bill that will permit members of the Catawba Indian Tribe of South Carolina to divide their tribal assets and discontinue their special Indian relations with the Federal Government.[39]

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[37] July 27, 1959, H.Tr. at 89.

[38] July 10, 1959, H.Tr. at 20.

[39] Department of the Interior, BIA Press Release (June 10, 1959) (R. Vol. III, Ex. 23) (J.A. 118). *See also* R. Vol. III, Exs. 28, 30.

Assistant Secretary of the Interior Roger Ernst submitted a letter in support of H.R. 6128, and a similar letter in support of a nearly identical Senate bill, in which he stated:

> When the program is completed, the Catawba Indians will cease to be subject to the Federal Indian laws . . . .[40]

Thus, the supporters of the bill presented and explained it as a termination act *completely* ending any special federal status for the Catawbas, and Congress understood that it was passing a bill similar to the other termination acts it had been considering and passing since 1954.[41]

On September 21, 1959 the President signed the bill,[42] but it was not yet effective because the Catawba termination act required the adult Catawbas to reaffirm that they desired termination.[43] Prior to the referendum, the Department of the Interior sent the Catawbas a detailed explanation of the act, emphasizing its finality and sweeping application:

> Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes," so the individual members will no longer be subject to laws which apply only to Indians. Nothing in the act

[40] *See* H.R. Rep. No. 910, 86th Cong., 1st Sess. *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2673 (R. Vol. III, Ex. 25) (J.A. 123). S. Rep. No. 863, 86th Cong., 1st Sess. 3 (1959) (R. Vol. III, Ex. 26) (J.A. 130).

[41] *See, e.g.*, 105 Cong. Rec. 15583 (1959) (R. Vol. III, Ex. 24). (Extended remarks of Congressman Berry describing bill as a "termination of the Catawba Indian Reservation").

[42] 105 Cong. Rec. 19751, 19752 (1959) (R. Vol. III, Ex. 27). Pub. L. No. 86-322, 73 Stat. 592 (1959).

[43] 25 U.S.C. § 931.



> prohibits those interested in organizing under State law to carry on any of the nongovernmental activities of the group.[44]

After receiving this explanation, the Catawbas voted once again in favor of termination. On July 1, 1960, the Secretary of the Interior published notice in the Federal Register that the Catawbas had voted to accept the 1959 act.[45] On February 7, 1961, the Department of the Interior published a "final roll" listing the Catawbas.[46] On July 1, 1962, the Secretary took the final step of revoking the Catawbas' constitution, and the Catawbas were officially terminated.[47]

Congress thereafter treated the Catawbas as an Indian group completely terminated from any federal trust relationship.[48] When Congress directed a study of the termination acts, the Catawba Act was included.[49] Un-

[44] R. Vol. III, Ex. 29 (attachment sent to Catawbas) (J.A. 137). The plaintiff Catawba corporation is precisely the kind of nongovernmental organization Congress contemplated that the Catawbas might create. The Department's explanation of the termination act, however, makes it abundantly clear that such an organization would be subject to state law and would not qualify as a "tribe" within the special meaning of that term in federal law. *See* below at 47-50.

[45] 25 Fed. Reg. 6305 (1960) (R. Vol. III, Ex. 32). *Also* Memorandum from Commissioner of Indian Affairs Glenn Emmons to the Secretary of the Interior stamped received on June 30, 1960 (R. Vol. III, Ex. 31).

[46] 26 Fed. Reg. 1680 (1961) (R. Vol. III, Ex. 34).

[47] R. Vol. III, Exs. 35, 36 (J.A. 138, 140); R. Vol. III, Ex. 37.

[48] *Hearings on S. 3174 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 87th Cong., 2d Sess. 8 (1962) (R. Vol. III, Ex. 10). (Senator Mangam describing the Catawba legislation as a "termination of the federal trust over the affairs" of the Catawbas) (R. Vol. III, Ex. 10).

[49] Task Force Ten, *Report on Terminated and Nonfederally Recognized Indians*, 1650 (Oct. 1976) (U.S. Gov't Printing Office).

like the Menominee Indians and a few other terminated groups, the Catawbas have never been "restored." [50] The Bureau of Indian Affairs includes them on its updated list of terminated Indian tribes.[51]

Thus, the Catawba termination act was referred to by those who enacted it,[52] those who administered it,[53] and by the Catawbas themselves [54] as a termination act. In-

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[50] *E.g.*, 25 U.S.C. §§ 903-903f (1982) (repealing the Menominee termination act).

[51] BIA Branch of Tribal Relations: List of Indian Tribes Terminated from Federal Supervision (April 1, 1981), (R. Vol. III, Ex. 39) (J.A. 142).

[52] The act's sponsor, Congressman Hemphill told the Subcommittee that the bill was "the usual termination bill, with the usual provisions with which you are intimately familiar." July 10, 1959, H.Tr. at 12. *See also* remarks of Mr. Edmonson, July 10, 1959, H.Tr. at 20 (Catawba act similar to Wyandotte and Peoria termination acts); remarks of Subcommittee Chairman Haley, July 27, 1959, H.Tr. at 90 (calling the envisioned result of the bill "termination"); remarks of Mr. Edmonson, August 7, 1959, Executive Session transcript at 136 (noting that provisions for vocational training are "in conformity with similar language that has appeared in all of the termination bills adopted by Oklahoma Indian Tribes so far"); letter recommending an amendment proposed by the Association on American Indian Affairs, Inc., July 10, 1959, H.Tr., letter found as enclosure after 14, (describing the Catawba act as "a bill to terminate Federal relations with the [Catawbas]").

[53] Administrative officials consistently referred to the bill as termination legislation. *See* remarks of H. Rex Lee, Associate Commissioner of the BIA, July 27, 1959, H.Tr. at 85, 86 (referring to the proposal concerning the Catawbas as "termination"); remarks of Lewis A. Sigler, Legislative Counsel, Office of the Solicitor of DOI, August 12, 1959, full committee meeting transcript at 10, 15 (describing the referendum procedure under the Catawba act as a "termination process" and comparing the Catawba act to other termination acts).

[54] The Catawbas themselves referred to the proposal as "termination." *See* remarks of Catawba Samuel Beck, July 10, 1959, H.Tr. 46 ("I feel if termination is made then our tribe will be non-existent from here on out and we will not have a reservation."). *See also*



deed, in *Affiliated Ute* this Court itself identified the Catawba act as a termination act.[55]

### C. *The Catawba Act Plainly Directs That State Law Shall Apply To The Catawbas.*

As this Court recently reiterated, "the starting point in every case involving construction of [a] statute is [the] language itself." [56] The language of the Catawba termination act compels the conclusion that state law applies to the Catawbas and any assertion of property rights by them. Section 5 of the Catawba termination act declares, without ambiguity or qualification, that upon its effective date:

> [T]he laws of the several States shall apply to them [the tribe and its members] in the same manner they apply to other persons or citizens within their jurisdiction.

The court of appeals minority accurately described this language as "plain and far-reaching." [57] The Solicitor General likewise has concluded that Section 5 "expressly provides that state laws shall apply to them," [58] stating, "The fact is the Catawba Act is not equivocal." [59]

Far from finding any ambiguity in the language contained in the Catawba termination act and similar acts that would cast doubt on the applicability of state law to terminated Indians, this Court has declared that a termi-

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references to "termination," July 10, 1959, H.Tr. at 63 (by Beck), 64, 68, 78 (by Catawba Mrs. F.G. Davis).

[55] *See Affiliated Ute*, 406 U.S. 128, 133 n.1, listing the Catawba act as "one of a series of termination [acts]."

[56] *E.g.*, Landreth Timber Co. v. Landreth, —— U.S. ——, 105 S.Ct. 2297, 2298 (1985), *quoting* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

[57] Pet. App. at 25a.

[58] U.S. Brief at 9.

[59] U.S. Brief at 15.

nation act is an explicit congressional directive that state law shall broadly apply to Indians. Comparing the explicit language of the termination acts to more general legislation extending only certain types of state jurisdiction over Indians, the Court said in *Bryan* v. *Itasca County*:

> [*T*]*ermination Acts* [*are*] . . . *cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation.* [Citations omitted.] These termination enactments provide expressly for subjecting distributed property "and any income derived therefrom . . . to the same taxes, State and Federal, as in the case of non-Indians," [citations omitted] and provide that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction . . . ." [*T*]*his* [*is*] *express language respecting state taxation and application of the full range of state laws to tribal members* . . . .[60]

Similarly, in *United States* v. *Antelope*,[61] the Court declared that termination acts make state laws applicable to the affected Indians rather than federal laws such as the Major Crimes Act. *See also United States* v. *Heath*, cited with approval in *Antelope*, where the court of appeals stated:

> Pursuant to [the Klamath termination act], Klamath Indians are subjected to state laws and are to be dealt with by the law no differently than any other citizen of a state.[62]

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[60] Bryan v. Itasca County, 426 U.S. 373, 389-90 (1976) (emphasis supplied).

[61] United States v. Antelope, 430 U.S. 641, 646-47 n.7 (1977).

[62] United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974). The operative provision of the Klamath termination act, 25 U.S.C. § 564q (1982), contains language similar to that of the Catawba act. *Accord*, Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981) (holding that state law applied to property of terminated Indian).



The legislative history of the Catawba termination act confirms that Congress intended to make state law apply to the Catawbas and any property interests they held. Congressman Robert Hemphill, introduced the bill by explaining:

> It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.[63]

Congressman Hempbill explained in hearings on the bill that after termination all of the Catawbas' activities would be governed by state law. For example, he specifically advised the Catawbas to form a non-profit, *state*-chartered corporation to conduct any group activities and to maintain an exemption from state taxes.[64] Similarly, Subcommittee Chairman Haley and Bureau of Indian Affairs Associate Commissioner H. Rex Lee each testified that after passage of the termination act that Catawbas could act collectively as a non-profit corporation subject to *state* law.[65] In fact, some Catawbas testified in opposition to the proposed legislation precisely because they understood that the termination act would subject them to state law, including various property and income taxes which they had not previously been required to pay.[66] One such Catawba, Samuel Beck, acknowledged:

> Of course, that is the idea of this bill, that we will be put on the same footing as the other citizens in the country . . . .[67]

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[63] 105 Cong. Rec. 5162 (1959) (R. Vol. III, Ex. 22).

[64] July 10, 1959, H.Tr. at 30.

[65] July 10, 1959, H.Tr. at 53-4; July 27, 1959, H.Tr. at 90.

[66] July 10, 1959, H.Tr. at 53-63.

[67] July 10, 1959, H.Tr. at 45-6.

Other Catawbas spoke in support of the legislation, embracing both the responsibilities it would impose on them, such as the payment of state taxes, and the benefits it would provide.[68] Nowhere in the hearings, committee meetings, or congressional debate on the legislation, or in the meetings held with the Catawbas, did anyone suggest that the Catawbas would be immune from any state law after the termination legislation became effective.

Furthermore, the Department of the Interior contemporaneously interpreted the Catawba termination act as subjecting the Catawbas to state law. Pursuant to the terms of the act, a plebiscite was held in which all adult Catawbas voted to approve or disapprove implementation of the act. In preparation for this referendum, the Department of the Interior sent the Catawbas a detailed explanation of the act. The explanation noted that the Indians might organize as a non-profit organization to conduct community activities, subject to *state* law.[69] Later, when the Secretary of the Department of the Interior officially revoked the Catawbas' tribal constitution, the Secretary wrote to Catawba Chief Albert E. Sanders, Sr. that "the laws of the several States shall apply," in accord with Section 5 of the Catawba termination act.[70] This contemporaneous interpretation of a statute by those responsible for administering it "is entitled to very great respect." [71]

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[68] July 27, 1959, H.Tr. at 97-109. A State Representative who attended a meeting of the Catawbas to discuss the legislation had specifically cautioned them that *state* law would apply and would require any Catawbas on welfare who held title to property to give the State of South Carolina a lien on that property. Minutes of the Special Meeting of the Catawba Council held at the Catawba Indian School on Saturday, March 28, 1959 (minutes taken by a BIA assistant accompanying BIA Supt. Butts) (R. Vol. III, Ex. 19) (J.A. 110-15).

[69] R. Vol. III, Ex. 29 (J.A. 137).

[70] R. Vol. III, Ex. 35 (J.A. 139).

[71] Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, —— U.S. ——, 105 S.Ct. 2587, 2597 (1985), *quoting* Edward's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).



Thus, the Catawba termination act expressly directs that state law apply to the Catawbas, and this Court has declared that same language to subject Indians to state, instead of federal, law. Legislative history and contemporaneous administrative interpretation further confirm that Congress intended to change the Catawbas' legal status so that they would hold no special immunities, privileges, rights or restrictions because of their Indian heritage.

### D. *Because Congress Ended Any Special Federal Status Of The Catawbas, State Law, Including State Statutes Of Limitations, Necessarily Began To Apply To The Catawbas.*

Even if Section 5 of the Catawba act had not explicitly directed that state law apply to the Catawbas, the termination of any special status under federal law made state law applicable to the Catawbas and to the enforcement of any alleged property interests. It is only Indians' special status under federal law that precludes the operation of state law with respect to them.[72] By terminating any special federal status held by the Catawbas, Congress eliminated the sole impediment to the application of state law to them. As a result, state law, including statutes of limitations, applied to the Catawbas.[73]

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[72] *Oneida II*, 53 U.S.L.W. at 4229 (March 4, 1985).

[73] *See* Schrimpscher v. Stockton, 183 U.S. 290 (1902); Dennison v. Topeka Chambers Indus. Dev. Corp., 527 F. Supp. 611 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984); Dillon v. Antler Land Co., 341 F. Supp. 734, 741-42 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 431 U.S. 992 (1975). *See* above at 8-9 and nn.11-13, and below at 32 and nn.93-94. Because the statute of limitations already barred this action, it was unnecessary to analyze whether related equitable doctrines of repose such as laches also barred the action. *Compare* Felix v. Patrick, 145 U.S. 317, (1892) (applying doctrine of laches). The application of such doctrines was not briefed or decided in the court below.

The Court's decision in *Schrimpscher* v. *Stockton*[74] demonstrates that the court of appeals majority should be reversed. In *Schrimpscher*, the Indian heirs of a Wyandotte Indian sued to recover lands their predecessor had conveyed to non-Indians. Although the conveyance occurred when alienation of the land was prohibited by a federal treaty, a later treaty terminated all such restrictions. The Court held that the Indians' claim was barred by state statutes of limitations, which had begun to run once the restrictions were lifted and the Indians held the same rights as other persons:

> Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered [sic] title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute, (whether the limitation be three or fifteen years), since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years.[75]

The Court rejected the *Schrimpscher* plaintiffs' argument that state statutes of limitations do not run against Indians. Instead, the Court ruled that state law applied, relying upon language in a treaty which, like Section 5 of the Catawba termination act, provided that the Wyandotte Indians "shall in all respects be subject to the laws of the United States, and of the Territory of Kansas, in the same manner as other citizens of said Territory."[76]

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[74] *Schrimpscher*, 183 U.S. 290 (1901).

[75] *Id.* at 296.

[76] *Id.* at 297. *See also* Dickson v. Luck Land Co., 242 U.S. 371 (1917).



The Court's analysis in *Schrimpscher* continues to be applied by the lower courts. In *Dillon* v. *Antler Land Co.*,[77] Indian land was allegedly transferred in violation of a federal restriction on alienation. After the transfer, Congress removed the restriction and directed that state law apply. The court held that the state statute of limitations began to run at the time state law was made applicable and barred the claim. Similarly, relying on *Schrimpscher*, the court in *Dennison* v. *Topeka Chambers Industrial Development Corp.*[78] held that the state statute of limitations barred a claim that Indian property had been conveyed in violation of federal restrictions against alienation. The court declared that the statute of limitations began to run once restrictions were removed and state law became applicable.

Courts which have declared that Indian land claims are not barred by state law defenses, have done so because the Indians involved still held a special status under federal law.[79] No court has held that state law is inapplica-

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[77] Dillon v. Antler Land Co., 341 F. Supp. 734, 741-42 (D. Mont. 1972), *aff'd*, 507 F.2d 940, 942-43 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975).

[78] Dennison v. Topeka Chambers Indus. Dev. Corp., 527 F. Supp. 611 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984).

[79] *See, e.g., Oneida II*, —— U.S. ——, 53 U.S.L.W. 4225, 4229 (March 4, 1985) (state statute of limitations did not apply to Indian land claim because Congress had specifically provided that state law would not apply to pre-1952 claims in enacting a statute that otherwise gave state courts civil jurisdiction over Indians), *citing* Ewert v. Bluejacket, 259 U.S. 129, 137 (1922). *See also* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975) (no evidence that Congress had ever *terminated* the federal trust relationship); United States v. Schwarz, 460 F.2d 1365, 1371-1372 (7th Cir. 1972) (state law defenses not applicable so long as restrictions on alienation of Indian land exist); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 420-23 (4th Cir. 1938) (state law did not apply to Eastern Band of Cherokee Indians precisely because those Indians were under the guardianship of the federal government, *citing Schrimpscher*); Narragansett Tribe v. Southern

ble to an Indian land claim where a termination act has become effective or where the federal government has otherwise acted to completely end any special federal status.

**II. State Law Now Bars This Action.**

South Carolina law requires any citizen or person, including the respondent state-chartered corporation, to bring an action for recovery of real property within ten years.

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.[80]

As the Supreme Court of South Carolina has affirmed:

> [A defendant in a claim to recover land] may defeat the plaintiff's title by showing that *the plaintiff himself has not been in possession for 10 years next before the beginning of th*[*e*] *action*; . . . the law

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Land Dev. Corp., 418 F. Supp. 798, 803-05 (D.R.I. 1976) (no federal statute subjected the Indians to state law and they had never been termin[illegible]ed); Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780, 784 85 (D. Conn. 1976) (same).

Whether the South Carolina statute of limitations became directly applicable (*Schrimpscher*, 183 U.S. 290 (1901)) or was borrowed and applied to the Catawbas' claim (*Oneida II*, —— U.S. ——, 53 U.S.L.W. 4225, 4229 (March 4, 1985)) the result is the same. Once Congress terminated its federal relationship with the Catawbas and made state law applicable to them and all their rights, privileges and obligations, no federal policy precluded the application of the state statute of limitations to this claim.

[80] S.C. Code Ann. § 15-3-340 (Law. Coop. 1976). Seisin was a form of possession under the common law. Even if a person were not himself physically in possession of land, he could be "seized" if his tenants were in physical possession. *See, e.g.*, Haithcock v. Haithcock, 123 S.C. 61, 115 S.E. 727, 729 (1923).



> makes possession a very strong factor in the question of title to real estate, and it says that if a man stays out of possession for 10 years, asserts no claim to a piece of property, does not occupy it by himself or tenants, and lets that situation remain for 10 years, the law says that it is too late for him to come in, that he is barred by the statute of limitations, and having slept on his rights for as long as 10 years, he cannot come in afterwards and assert his rights.[81]

Because the Catawba termination act became effective on July 1, 1962, making state law applicable to the Catawbas, the South Carolina statute began running on that date. By their own admission, the Catawbas exercised no powers of ownership over the land in issue for approximately 140 years before suit was commenced.[82] They admittedly did not possess the land in issue at any time during the ten years before they commenced this action. Accordingly, this action is now barred.[83]

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[81] *Id.*

[82] Complaint ¶ 19 (R. Vol. I, N.R. 1) (J.A. 23).

[83] In opposition to the petition for certiorari, and in both the district court and the court of appeals, the respondent attempted to save a portion of its claim by arguing that the state statute of limitations only bars its claim against some, but not all, of the current landowners. Respondent Tribe's Supplemental Brief (on petition for a writ of certiorari) 1-5. Because some of the current landowners may not have possessed their property continuously for the ten years necessary under South Carolina law to acquire title by adverse possession, the respondent mistakenly contends that it can maintain, against those defendants, a claim that accrued in 1840.

The respondent's argument, however, confuses the statute of limitations with the doctrine of adverse possession. The statute of limitations defeats a plaintiff's claim by barring the plaintiff's right to maintain an action. In South Carolina the statute of limitations operates to bar a plaintiff's claim upon a demonstration that the *plaintiff* has not possessed the land at issue within ten years of the commencement of its action. If a plaintiff's claim is barred by the statute of limitations, a defendant has no further obligation to demonstrate that he has himself satisfied the requirements of adverse

A second South Carolina statute confirms that the Catawbas were obligated to bring their claim within ten years. By this statute, South Carolina requires a person who has been subject to a disability that tolled the running of the statute of limitations to bring any action to recover land within ten years after the date that the disability ends.

> If a person entitled to commence any action for the recovery of real property [is subject to a disability such as minority or insanity] . . . [t]he time during which such disability shall continue shall not be deemed any portion of the time . . . limited for the commencement of such action . . . . but such action may be commenced . . . within ten years after the disability shall cease . . . *But such action shall not be commenced . . . after that period.*[84]

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possession. The respondent's admitted failure to act on its claim while being out of possession for more than ten years since the statute of limitations began to run now bars its claim.

Whether some or all of the current landowners could also defeat the respondent's claim by adverse possession is irrelevant. In fact, the South Carolina adverse possession statute is found under a different chapter of the code at § 15-67-210. That courts often address both the statute of limitations and the concept of adverse possession is explained by the fact that defendants often allege both in their effort to defeat a plaintiff's claim. *E.g., Haithcock,* 123 S.C. 61, 115 S.E. 727, 729-30 (1923). If the respondent is barred from asserting its allegedly superior title by the statute of limitations, the thousands of persons holding record title will be able to rely upon their record title without any need to resort to adverse possession.

The district court correctly rejected the respondent's argument concerning adverse possession. Pet. App. at 49a. The court of appeals never reached this issue since it determined that the state statute of limitations did not apply.

[84] S.C. Code Ann. § 15-3-370 (Law. Coop. 1976 and Supp. 1984) (emphasis supplied). *See* MacCaw v. Crawley, 59 S.C. 342, 37 S.E. 934 (1901). *Accord,* Schrimpscher v. Stockton, 183 U.S. 290 (1901); Felix v. Patrick, 145 U.S. 317, 330-31 (1892).



The Catawbas contend that they were wards of the United States prior to enactment of the Catawba termination act and were therefore "disabled" from conveying their land without consent of the United States. When the Catawba termination act ended that "disability" in 1962 and made state law applicable to the Catawbas, they had ten years to bring their action.[85] Having failed to do so, they are now barred.

### III. The Decision By The Court Of Appeals Majority That State Law Does Not Apply Defies The Plain Language Of The Statute.

The court of appeals majority reached a conclusion diametrically opposed to the plain words of the Catawba termination act. Notwithstanding the act's explicit declaration that "the tribe and its members shall *not* be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians," the majority ruled that the Catawbas *shall* be entitled to one of the special services the United States provides to Indians—service as their trustee or guardian.[86] Despite the act's explicit command that "*all* statutes that affect Indians because of their status as Indians shall not be applicable to them [the tribe and its members]," the majority held that at least one federal Indian statute, the Nonintercourse Act *shall* be applicable.[87] Finally, despite the statute's command that "the laws of the several states *shall apply* [to the tribe and its members] *in the same manner* they apply to the other

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[85] *E.g., Schrimpscher,* 183 U.S. 290, 296. Because the defendant's motion below addressed only the effect of the Catawba termination act, the defendants assumed *arguendo* that the Catawbas possessed a sufficient special federal status and federal trust relationship until the effective date of that act to prevent state statutes of limitations from beginning to run against them.

[86] *Cf.* 25 U.S.C. § 935 *with* Pet. App. at 19a-22a.

[87] *Cf.* 25 U.S.C. § 935 *with* Pet. App. at 19a-22a.

persons or citizens within their jurisdiction," the majority held that the act did *not* make state law apply to the Catawbas in the same manner it applied to others.[88]

To reach this result, the majority misinterpreted Section 6 of the act, 25 U.S.C. § 936, as somehow precluding the application of state law, offered a grammatical construction of Section 5 which is in fact impossible, and relied on canons of construction which have no application where, as here, congressional intent is clearly expressed and unambiguous.

### A. *The Court Of Appeals Majority Mistakenly Concluded That Section 6 Of The Act Is Inconsistent With The Application Of State Law To This Action.*

The majority declared that Section 6 made it "incongruous" for the South Carolina statute of limitations to apply to any claim the Catawbas might have possessed.[89] Section 6 provides:

> Nothing in [this act] shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina.[90]

Nothing in Section 6 of the Catawba termination act, however, is incompatible with the application of the state statute of limitations to the Catawbas' claim. Section 6 makes it clear that the termination act changed only the Catawbas' special status under *federal* law and did not affect any rights or obligations they may have had under *state* law. Section 6 thus assured that the act would not be construed to interfere with state "rights, privileges or obligations." [91]

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[88] *Cf.* 25 U.S.C. § 935 with Pet. App. at 22a-23e.

[89] Pet. App. at 23a.

[90] 25 U.S.C. § 936. *See* Pet. App. at 58a.

[91] Consistent with Section 6, Section 3 left to the State of South Carolina the decision whether the reservation held in trust by the state would be divided and distributed pursuant to the termination act or would continue to be held by the state.



If any construction of the act is "incongruous," it is the one offered by the majority. As interpreted by the majority, Section 6 would render meaningless the explicit and unqualified directive in Section 5 that state law shall apply to the Catawbas. The majority's interpretation thus not only cannot be supported by the language of Sections 5 and 6, but also violates "the elementary canon of statutory construction that a statute should be interpreted so as not to render one part inoperative." [92] Furthermore, the majority's construction even renders portions of Section 6 meaningless. That section expressly subjects the Catawbas to the "obligations" of South Carolina law, and one of the obligations that South Carolina imposes on its citizens is that they assert any claim within the time period provided by law.

The majority apparently reasoned that if the state statute of limitations was not applicable to the Catawbas' claim prior to the termination act, the provisions of Section 6 preserving the Catawbas' rights and obligations under state law continued to preclude the running of the statute of limitations.[93] The majority failed to recognize that it was only *federal* law, not *state* law, that previously prevented the running of the state statute of limitations on the Catawbas' claim. Once Congress determined that state law should apply to the Catawbas and that the Catawbas' relationship with the United States should be terminated, federal law no longer prevented application of the state statute of limitations.[94]

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[92] *See* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, —— U.S. ——, 105 S.Ct. 2587, 2595 (1985), *quoting* Colautti v. Franklin, 439 U.S. 379, 392 (1979); Gen. Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 778 (5th Cir. 1968).

[93] Pet. App. at 22a-23a.

[94] The Solicitor General explained that it is special protection under federal law which "uniquely immunizes the title of Indian tribes

### B. *The Decision Of The Court Of Appeals Majority Is Based Upon A Grammatically Impossible Construction Of The Act.*

In an apparent effort to diminish the effect of the Catawba termination act, the court of appeals majority concluded that Section 5 made state law applicable to individual Catawbas but not to Catawbas acting collectively. Focusing upon individual clauses of the critical sentence in Section 5, the majority concluded that references to "them," and to "Indians" were references only to individual Indians and not to the tribe.[95] This construction, however, is grammatically impossible,[96] and, as the Solicitor General stated, is "clearly wrong." [97]

The second sentence of Section 5 of the Catawba termination act is a compound sentence composed of three independent principal clauses. The "tribe and its members" are the subject of the sentence, and its provisions set forth what happens to "them," the subject of the sentence. In simplified form, the sentence reads:

> [T]he tribe and its members shall not be entitled to any of the special services . . . [provided] for Indians because of their status as Indians, all [federal] statutes . . . that affect Indians because of their status as Indians shall be inapplicable to them; and [state law] shall apply to them. . . .

The antecedent of the term "them" is the "tribe and its members," and not, as the majority concluded, the word "Indians." Instead, the word "Indians" appears in adjectival phrases to describe which services and which

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from state-law rules." U.S. Brief at 10-11. Once federal protection has been removed, either by explicit statutory language making state law apply or by the termination of any special federal status or trust relationship, then state law automatically begins to apply.

[95] Pet. App. at 20a-21a.

[96] *See also* Reply to Brief in Opposition to the Petition at 3-5.

[97] U.S. Brief at 11-12.



statutes shall be inapplicable to the "tribe and its members."

As the Solicitor General explained, the majority's reasoning "is flawed even if the court were correct in focusing on the word 'Indians'." [98] The initial clause of the same sentence provides that " 'the tribe and its members shall not be entitled to any services performed by the United States for *Indians* because of their status as *Indians*'." [99] That clause clearly contemplates that the word "Indians" applies to both the tribe and its members.

The majority attempted to bolster their construction by asserting that the 1834 Nonintercourse Act used the term "Indians" only to refer to individual Indians and not Indian tribes. They then concluded that the Congress that passed the 1959 Catawba termination act must have known of and employed the same purported distinction.[100] But there is no such distinction in the Nonintercourse Act, which uses the term "Indians" interchangeably with the terms "Indian nation" and "tribe of Indians." [101]

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[98] U.S. Brief at 12, n.11.

[99] *Id.* (emphasis supplied).

[100] Pet. App. at 20a-21a.

[101] The first sentence of this statute requires that a land transfer by an "Indian nation or tribe of Indians" be conducted pursuant to treaty. The second sentence imposes a fine on any person who negotiates a transfer from an Indian nation or tribe without federal authority. The third sentence, however, permits a representative of a state, accompanied by a federal commissioner, to negotiate a transfer of land by a treaty "with Indians" and to compensate "the Indians." The third sentence modifies the provisions of the first and second sentences for dealing with Indian tribes, describing the one circumstance in which a state may treat with a tribe. It merely substitutes the term "Indians" for "tribes." Indeed, the third sentence only makes sense if the term "Indians" means "Indian tribes," since the federal government did not negotiate treaties with individual Indians, and since Indians commonly held land collectively as a tribe, not as individuals.

Moreover, in *Wilson* v. *Omaha Indian Tribe* [102] this Court declared that "Indians" and "Indian tribes" mean the same thing in the Trade and Intercourse Act, of which the Nonintercourse Act is a part. Thus, neither English grammar nor the purported distinction in the language of the Nonintercourse Act permits the majority's construction of the Catawba termination act.

### C. *The Court Of Appeals Majority Erroneously Resorted To Canons Of Construction That Have No Application To This Plain And Unambiguous Statute.*

Ignoring the statute's clear and explicit directive that state law shall apply to the Catawbas, and its termination of all aspects of special status under federal law, the majority announced a canon of construction that statutes affecting Indians "should not be construed to the Indians' prejudice." [103] That is simply not the law. Congressional intent, as expressed in a statute, must be given effect by a court.[104] There is no canon of construction that permits a court to ignore congressional intent in order to favor a particular group of litigants.[105] As this

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[102] Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664-66 (1979) (subsequent history omitted). *See also* Mohegan Tribe v. Connecticut, 638 F.2d 612, 627 n.18 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

[103] Pet. App. at 13a. Presumably the majority used the word "Indians" here to include Indian tribes, as well as individual Indians, contradicting their construction of the word "Indians" in the Catawba act as limited to individual Indians.

[104] *E.g.*, United States v. First National Bank, 234 U.S. 245 (1914); Adams v. Morton, 581 F.2d 1314, 1320 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) ("The court's first duty in construing the statute is to effectuate the express intent of Congress.").

[105] A court's role is to construe the law, not to rewrite it. *See, e.g.*, United States v. Hoodie, 588 F.2d 292, 295 (9th Cir. 1978), *vacating* 441 F. Supp. 835 (D. Or. 1977):

> [I]t is apparent that the district court was guided largely by its perception that Congress has become increasingly solicitous



Court recently explained in rejecting the Klamath Indians' claim that they retained a right to hunt and fish on ceded lands free of state regulation, *Oregon Department of Fish and Wildlife* v. *Klamath Indian Tribe*:

> [E]ven though "legal ambiguities are resolved to the benefit of the Indians". . ., courts cannot ignore plain language that, viewed in historical context and given a "fair appraisal" . . ., clearly runs counter to a Tribe's later claims.[106]

Special canons of construction favoring Indians *only* come into play if, after examination of the language of the statute to be construed, the legislative history, administrative interpretation and the full context, it is still uncertain what Congress intended.[107] As this Court said in *Rice* v. *Rehner*:

> [W]e have consistently refused to apply such a canon of construction [favoring Indians] when application would be tantamount to a formalistic disregard of congressional intent.[108]

In this case there is no uncertainty. The statute directs, and its legislative history confirms, that state law

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of Indian rights and that its holding would favor such rights. In another context, however, the Supreme Court admonished:

> [A] statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." [Citations omitted.]

[106] Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, —— U.S. ——, 53 U.S.L.W. 5106, 5112 (July 2, 1985).

[107] *E.g.*, Lower Brule Sioux Tribe v. United States, 712 F.2d 349, 352 (8th Cir. 1983) ("[A]n examination of the legislative history and circumstances surrounding the enactment of a statute may reveal Congressional intent and resolve the ambiguity, obviating resort to these rules.").

[108] Rice v. Rehner, 463 U.S. 713, 732 (1983).

shall apply to the Catawbas and that the Catawbas shall not have any special status under federal law. No canon of construction authorized the court of appeals majority to ignore Congress's manifest intent.

## IV. The Court Of Appeals Majority Erred In Ruling That Some Trust Relationship Or Special Federal Status Persisted After The Catawba Termination Act Became Effective.

Although the language and legislative history of the Catawba termination act clearly manifest Congress's intent that any trust relationship between the Catawbas and the United States be terminated, the majority nevertheless held that the Catawbas have a special status under federal law which precludes application of state statutes of limitations. The majority accomplished this revision of the statute Congress enacted by holding that the act (1) operated only to rescind a 1943 Memorandum of Understanding between the Department of the Interior, the State of South Carolina and the Catawbas and (2) preserved this claim from its effects in any event.

The court of appeals majority was not authorized, however, to rewrite the law and create a special status for the Catawbas. As another court of appeals declared in giving effect to the Affiliated Ute termination statute:

> It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination.[109]

### A. *The Majority Erroneously Concluded That The Catawba Termination Act Was Intended Only To Revoke The 1943 Memorandum Of Understanding.*

Although the court of appeals majority recognized that the purpose and effect of federal Indian policy in the

[109] Reyos v. United States, 431 F.2d 1337 (10th Cir. 1970), *aff'd in relevant part*, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).



1950's and early 1960's was to end the special status held by Indians under federal law,[110] it nevertheless concluded that the Catawba termination act "was intended only to end federal supervision and assistance arising out of the 1943 Memorandum of Understanding." [111] Nothing in the language of the Catawba termination act suggests so limited a purpose. The provisions of Section 5 are as broad and all encompassing as the provisions of other termination acts.[112] In fact, those provisions are the hallmark of termination legislation.[113] According to the Solicitor Gen-

[110] Pet. App. at 9a and n.5.

[111] Pet. App. at 15a-16a. Pursuant to that Memorandum of Understanding, South Carolina agreed to authorize the expenditure of up to $75,000 to purchase lands for the Catawbas, and the state subsequently purchased over 3,000 acres of land for the Catawbas. South Carolina also agreed to appropriate at least $9,500 annually in 1944, 1945 and 1946 to be expended by the Office of Indian Affairs, and to extend the rights and privileges of all citizens, including admission to schools, to the Catawbas. The Office of Indian Affairs agreed to further assist the Catawbas. (R. Vol. V-VI, Ex. 52) (J.A. 45).

According to an exhibit submitted by the Catawbas, (R. Vol. V-VI, Ex. 50) (J.A. 41-2) the Memorandum of Understanding was treated by the Department of the Interior as a contract under the Johnson-O'Malley Act, 25 U.S.C. §§ 452-454 (1982). Because termination of such a contract does not require congressional action, it is highly unlikely that Congress would enact legislation for the sole purpose of rescinding that contract.

[112] Every one of the other termination acts contains similar operative provisions specifying that the terminated Indians will not be entitled to special federal Indian services, that federal Indian statutes will not apply to them, and that state law will become applicable to them. If Congress had intended to distinguish between the Catawba act and other termination acts and to limit the effect of the Catawba act, one would have expected some indication of that intent to be expressed. None was.

[113] For example, Congressman Aspinall cautioned Congress to include those provisions in the California Rancheria Act, 72 Stat. 619 (1958), to make clear that the legislation was indeed a termination act. Hearings on H.R. 2576, H.R. 2824, H.R. 2838, H.R. 6364 before the Subcommittee on Indian Affairs, 85th Cong., 1st Sess. at 98 (1957) (R. Vol. III, Ex. 8).

eral, the provisions found in Section 5 manifest Congress's intention to terminate "*all* trust relationships between the federal government and the tribe concerned, whatever their source." [114] No provision of the act limits its effect to revocation of the 1943 Memorandum of Understanding. Indeed, the act does not make even a single reference to the 1943 Memorandum.

Sections 3 and 4 of the act, providing for the distribution of assets, and the first clause of Section 5, ending federal Indian services, were sufficient, without more, to end any federal relationship arising solely from the 1943 Memorandum. Section 5, however, provides for much more than mere revocation of the 1943 Memorandum by directing that *no* federal Indian statutes shall apply to the Catawbas and that state law shall apply to them. Furthermore, Section 5 provides that *no* federal Indian services shall be available to them, not just the services the Catawbas were receiving under the 1943 Memorandum. The majority's interpretation would improperly render this substantial portion of the act unnecessary and meaningless.[115]

The broader purpose of the Catawba act is apparent from Section 8, which provided for educational services prior to the effective date of the act to enable the Catawbas, among other things, "to conduct their own affairs" and to orient them "in non-Indian community customs." Congress explained in Section 8 that these services were authorized "to help the members of the tribe . . . to assume their responsibilities as citizens without special services because of their status as Indians." This provision of the act made it plain that the Catawbas would no longer have the same *status* as Indians entitled to federal Indian services.

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[114] U.S. Brief at 15.

[115] Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, —— U.S. ——, 105 S.Ct. 2537 (1985).



The legislative history of the Catawba termination act confirms that the Catawba termination act did—and was intended to do—more than simply rescind the 1943 Memorandum.[116] The House and Senate Reports on the Catawba legislation explicitly describe the bill as intended to distribute tribal assets and to serve "other purposes." [117] These "other purposes," included giving the Catawbas the same legal status as other citizens of South Carolina and totally abolishing the Catawbas' special Indian relationship with the United States.[118]

Indeed, the Department of the Interior considered the cancellation of the 1943 Memorandum to be so subordinate an effect of the overall termination of the Catawbas that it was uncertain whether formal notice of the Memorandum's cancellation was even required. The Solicitor relegated the notice of the Memorandum's cancellation to an insignificant means for tying up "all the loose ends" prior to termination.[119] And, although the Department

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[116] When the *entire* legislative history of the Catawba termination act is reviewed there can be no doubt that the Catawba act was intended to operate as a complete termination of any special status under federal law. The court of appeals majority ignored most of the legislative history of the act, consisting of hearing records, congressional debates, and other materials. These materials were before Congress at the time the legislation was being considered and are therefore probative of Congress's intent. The majority relied heavily on other materials such as a resolution by the tribe requesting the right to alienate lands and a BIA employee's minutes of a meeting with the Catawbas, which have much less bearing on congressional intent. Pet. App. at 13a-14a.

[117] H.R. Rep. No. 910, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2571.

[118] *See* above at 12-19 and nn.25-55. The majority's construction of the statute would utterly defeat Congress's overarching purpose, which was to end the Indians' status as a segregated people subject to special federal supervision, restriction and privileges.

[119] Memorandum to the Commissioner of Indian Affairs from the Solicitor of the Department of the Interior (July 22, 1960) (R. Vol. VII, Supp. Ex. A) (J.A. 147).

did send the Catawbas notice of the cancellation of the 1943 Memorandum, it also gave them notice of the revocation of their constitution and by-laws, the termination of the legal relationship between the United States and them, the termination of federal services and the application of state laws to them.[120]

### B. *The Cases Relied Upon By The Majority Do Not Support The Conclusion That A Federal Trust Relationship Persisted After Termination.*

The court of appeals majority concluded that even after termination the Nonintercourse Act applied to the Catawbas and was the source of a federal trust relationship that prevented state law defenses from being raised against their claim,[121] relying chiefly, and mistakenly, upon *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*.[122] To be sure, the *Passamaquoddy* court ruled that Congress had established a trust relationship with Indians by enacting the Nonintercourse Act and that such a trust relationship existed even if federal administrative officials had not recognized the tribe or actively worked on their behalf. But *Passamaquoddy* was specifically limited to a situation where Congress had *not* directed that state law shall apply to a particular group of Indians, where Congress had *not* directed that special federal Indian statutes such as the Nonintercourse Act should thereafter be inapplicable to that group of Indians, and where Congress had *not* affirmatively acted to end any federal trust relationship. In fact, the *Passamaquoddy* court expressly limited its holding to those situations where Congress has not terminated the trust relationship.[123] Here Congress has acted.

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[120] R. Vol. III, Ex. 29 (J.A. 137).

[121] Pet. App. at 19a.

[122] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

[123] *Id.* at 380.



The majority also purported to find support in *Menominee Tribe* v. *United States*[124] for the proposition that the trust relationship resulting from the restrictions of the Nonintercourse Act persists unless explicitly terminated. The issue decided in *Menominee*, however, was not whether a trust relationship persisted after termination. Indeed, Justice Douglas's opinion in *Menominee* did not even discuss the issue. Rather, *Menominee* held only that hunting and fishing rights acquired by federal treaty and never voluntarily relinquished by the Menominee Indians had not been extinguished by the Menominee termination act. No such treaty right is at issue here.[125]

### C. *The Majority Incorrectly Concluded That This Claim Was Preserved From The Effects Of The Catawba Termination Act.*

The court of appeals majority held that the Catawba act did not affect this claim because "[T]he Act's history suggests a congressional intent not to affect any such claims."[126] However, no provision in the act preserves any claim of any kind from the effects of termination; and, when Congress wanted to preserve a claim from the effects of a termination act, it did so in plain language

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[124] Menominee Tribe v. United States, 391 U.S. 404 (1968).

[125] The 1763 treaty with Great Britain under which the Catawbas claim their interest in the land at issue does not restrict their ability to transfer their interest, nor does it grant them a right to own property or to enforce claims under different laws than non-Indians. Treaty of Augusta, November 10, 1763, Colonial Records of North Carolina, XI, at 199 (R. Vol. V-VI, Ex. 6) (J.A. 32-7).

The Catawba termination act only made whatever rights the Catawbas held under that treaty enforceable under state laws governing the bringing of claims. As the Solicitor General pointed out, holders of federal patents to land similarly derive their interest in the land under federal law but are required to enforce their property rights subject to state law. U.S. Brief at 10.

[126] Pet. App. at 16a.

that is absent from the Catawba termination act.[127] For example, in the Ponca termination act, Congress explicitly stated that "[n]othing [in the termination act] shall affect any claims heretofore filed against the United States. . . ." [128] In the Klamath termination act, Congress explicitly provided that "[n]othing [in the termination act] shall deprive the tribe . . . of any right, privilege, or benefit [under the Indian Claims Commission Act] . . . ." [129]

Certainly, if Congress had intended to preserve any claim by the Catawbas from the effects of termination, it would have done so in similar explicit language. It did not.[130] Instead Congress provided only that "rights,

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[127] *See, e.g.*, 25 U.S.C. § 564t (Klamath); 25 U.S.C. § 706 (Western Oregon); 25 U.S.C. § 677r (Ute Indians); 25 U.S.C. §§ 976 (Ponca Indians).

Congress used specific language in other termination acts when it intended the affected Indians to retain special rights free from the operation of state law. For example, the Klamath termination act provided that "[n]othing [in this act] shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights by nonuse shall not apply . . . until fifteen years after [the effective date of the termination act]. . . ." 25 U.S.C. § 564m(a). Thus, Congress specifically immunized a type of property right from the operation of state law for a certain period of time. In so doing, Congress demonstrated the ability to preserve such rights from the effects of a termination act. *See also* 25 U.S.C. § 752 (Paiute termination act shall not abrogate water rights); 25 U.S.C. § 851 (Ottawa termination act shall not abrogate water rights).

[128] 25 U.S.C. § 976.

[129] 25 U.S.C. § 564t.

[130] As the United States correctly states, Congress was not required to specifically make state law applicable to this claim. U.S. Brief at 15. "[T]he absence of congressional focus is immaterial where the plain language applies." Jefferson County Pharm. Ass'n v. Abbott Laboratories, 460 U.S. 150, 159 n.18 (1983). Congress used plain, broadly applicable language to cover whatever situations might arise after the termination act became effective. Congress could not be reasonably expected to anticipate each specific claim that might be asserted by the Catawbas.



privileges or obligations of the Tribe under the laws of South Carolina" should be unaffected by termination. The statute thus refers to and preserves only rights under *state* law, not *federal* law. If any claim was preserved, it was only a claim (or a right to bring a claim) under state law.[131]

Nor is there any basis for contending that any rights were implicitly preserved. This Court recently denied the Klamath Indians' claim to special hunting and fishing rights free of state regulation, rejecting the argument that such rights had been *implicitly preserved* because a 1901 agreement by the Indians ceding land had not mentioned those rights. The Court held that "a silent preservation" of those rights "would have been inconsistent with the broad language" of the instruments being construed.[132] Similarly, the silent preservation of this claim from the effects of the Catawba termination act would be inconsistent with the broad language of the act itself.

The majority largely based their conclusion that this claim was not affected by the termination act on the resolution passed by the Catawbas which requested that termination legislation be drafted and expressed a desire that a claim they might have against the State of South Carolina be unaffected by the legislation.[133] In fact, Con-

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[131] In the Ponca termination act, enacted three years after the Catawba act, Congress explicitly provided *both* that state rights and obligations would be unaffected by the termination act and that federal claims would be unaffected. 25 U.S.C. §§ 976, 977. The Catawba act lacks any provision that would preserve the Catawbas' claim from the effects of termination.

[132] Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, —— U.S. ——, 53 U.S.L.W. 5106, 5111 (July 2, 1985).

[133] The resolution, adopted by the Catawbas on January 3, 1959, asked that "nothing in this legislation shall affect the status of any

gress never contemplated that a claim of any kind would be preserved from the effects of the legislation that it considered and enacted.[134] No congressman even mentioned the possibility of preserving a claim from the operation of the termination statute. The intent of *Congress*, as plainly stated in the statute and fully confirmed by examination of the materials and testimony Congress had before it, was to make state law apply to the Catawbas and to completely end any special status they may have held under federal law. The majority's conclusion

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claim against the State of South Carolina by the Catawba Tribe." (R. Vol. III, Ex. 17) (J.A. 103). The resolution was passed by the Catawbas prior to the drafting of the legislation and was sent to BIA administrative officials.

Far more significant than the Catawbas' initial request for legislation was their vote to accept the legislation as it was enacted. In preparation for a vote on whether to implement the termination act, three years *after* its enactment and four years *after* the resolution, the Catawbas were explicitly informed that the laws of the United States which applied to tribes would no longer apply to them, that state law would apply to them, that any special relationship with the federal government would end, and that the tribe would disband as a federal tribe. 86-1 Cong. Rec. 5162 (April 7, 1959) (R. Vol. III, Ex. 22) (J.A. 116). The Catawbas voted to accept the Catawba act as it was drafted and enacted and explained to them—without any suggestion that their claim would be immune from state law.

[134] When he introduced the bill that became the Catawba termination act, Congressman Hemphill told his colleagues that the Indians had passed a resolution requesting legislation but made no mention of the resolution's request concerning a claim against the State of South Carolina. He told the other members of the House that the Catawbas desired the proposed legislation so that they could hold title to land, obtain credit more easily, and take on "the other privileges and responsibilities to which their citizenship entitles them." 105 Cong. Rec. 5162 (April 7, 1959) (R. Vol. III, Ex. 22) (J.A. 116). He reported that he had spoken with Catawba Chief Blue several times and that the Chief "wants his people to have the same privileges as other citizens." *Id.* Similarly, the House report on the bill noted that the Catawbas had passed a resolution requesting legislation without mentioning any potential claim. House Report 910 (R. Vol. III, Ex. 25) (J.A. 120-26).



that Congress intended to preserve this claim from the effects of state law is, accordingly, insupportable.[135]

### V. Even If The Catawba Termination Act Had Not Made State Law Apply To The Catawbas And Their Claim, The Action Was Properly Dismissed Because The Act Ended The Catawbas' Status As A Tribe Under Federal Law.

The court of appeals majority correctly recognized that the respondent must establish that it is a tribe under federal law to maintain this action.[136] The majority failed to recognize, however, that the Catawba termination act precludes the Catawbas, as a matter of law, from proving the requisite status.

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[135] Even assuming that the majority's strained interpretation of Section 6 had merit and that this provision operated to preserve a claim of the Catawbas arising from the 1840 treaty, the scope of this claim, as expressed by the Catawbas themselves, is far narrower than the claim they now assert. Specifically, the resolution adopted by the Catawbas requested only that "nothing in this legislation shall affect the status of any claim *against the State of South Carolina* by the Catawba tribe." (emphasis supplied). (R. Vol. III, Ex. 17) (J.A. 103). Thus, regardless of whether the Catawbas' resolution has any proper bearing on the construction of the act, it is clear that the Catawbas sought only to preserve a claim against the state and not against the many other public and private defendants named in this action.

[136] Pet. App. at 16a. Federal courts have been unanimous in holding that the establishment of present historic and continuous tribal existence is a prerequisite to maintaining an action under the Nonintercourse Act. Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); Narragansett Tribe of Indians v. Southern Land Dev. Corp., 418 F. Supp. 798, 803 (D.R.I. 1976) *citing* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). Because the Nonintercourse Act simply codified the federal common law restraint on alienation, *Oneida II*, —— U.S. ——, 53 U.S.L.W. 4225, 4227-29 (March 4, 1985), the respondent must also demonstrate its tribal status in order to avail itself of its federal common law remedies.

To qualify as a tribe under federal law a plaintiff must establish that its purported members are of the same or similar race, are a separate and distinct political entity, are a socially and culturally distinct community not assimilated into the general populace, and inhabit a particular area.[137] The distinction between a tribe under federal law, and a voluntary organization existing under state law is fundamental to federal Indian law.[138] The requirement that a putative tribe possess an independent political existence mandates that it establish a legal, political and governmental existence apart from the "general mass" of the population.[139] Indeed, it is a constitutional requirement that federal regulation of Indian affairs be based upon the existence of separate political institutions rather than a racial group consisting of Indians[140] or a voluntary social organization or association of Indians.[141]

As a result of the Catawba termination act, the Catawbas cannot be a separate and distinct political entity under federal law. Section 5 of the Catawba act specified that the tribal constitution would be revoked and provided no substitute authority or form of government. The act thereby ended the Catawbas' tribal status under federal law. In fact, the revocation of the tribal consti-

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[137] United States v. Candelaria, 271 U.S. 432, 442 (1926), *quoting* Montoya v. United States, 180 U.S. 261, 266 (1901). *See generally* Mashpee Tribe v. New Seabury Corp., 592 F.2d at 581-88, *cert. denied*, 444 U.S. 866 (1979).

[138] *See* Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 950 at n.7 (D. Mass. 1978), *aff'd sub. nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (group of Indians may be a tribe for other purposes even if it does not constitute a tribe under the Nonintercourse Act).

[139] United States v. Joseph, 94 U.S. 614, 617 (1877).

[140] United States v. Antelope, 430 U.S. 641, 646 (1977), *quoting* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

[141] United States v. Mazurie, 419 U.S. 544, 557 (1975).



tution was the clearest possible form of terminating any governmental authority the Catawbas may have had as a tribe under federal law.

Congress clearly equated revocation of the tribal constitution with the termination of tribal status under federal law. Section 5 of the act specifies that, after revocation, federal laws concerning Indians (including Indian tribes) shall be inapplicable to the Catawbas. Thus, after revocation of the tribal constitution, if the Catawbas still held the status of a tribe under federal law they would be in the unique position of a federal tribe subject to no federal law concerning Indians or Indian tribes. There is no indication of so unusual an intent in the statute or in the legislative history.

That Section 5 was understood by all affected parties to end the tribe's status as a governmental entity under federal law is confirmed by critical elements of the act's legislative history overlooked by the majority.[142] For example, the Report of the House Committee on Interior and Insular Affairs explained that the purpose of Section 8 of the act was "to provide for continuance of vocational training among the Catawbas *until the tribe disbands.*"[143] Before the Catawbas voted to accept the act, the Department of the Interior sent them a detailed explanation which specified that after termination the former tribe would no longer exist as "a legal entity which will be governed by Federal laws which refer to 'tribes'."[144] It further explained: "Nothing in the act prohibits those interested in organizing under State law

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[142] *See* above at 12-15.

[143] H.R. Rep. No. 910, 86th Cong., 1st Sess. *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2672-73 (emphasis supplied) (R. Vol. III, Ex. 25) (J.A. 122).

[144] Attachment to letter of November 17, 1959 from Peter Walz to Program Officer Bitney (emphasis supplied) (R. Vol. III, Ex. 29) (J.A. 137).

to carry on any of the *non*governmental activities of the group." [145]

The majority mistakenly equated the tribe's ability to organize as a voluntary, *non*governmental entity under *state* law with continued tribal status under federal law.[146] But Congress understood and intended the Catawba termination act to end any status as a tribe under federal law, and the statute has been consistently construed by administrative officials to have that effect.[147] Both the plain language of the statute and the contemporaneous understanding of all affected parties compel the conclusion that the act terminated any tribal status as a governmental entity under federal law and precludes the Catawbas from asserting this claim.

## CONCLUSION

The petitioners respectfully pray that the Court reverse the judgment and opinion of the court of appeals and affirm the dismissal of the action by the district court.

Respectfully submitted,

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

JAMES D. ST. CLAIR *
JAMES L. QUARLES, III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, Mass. 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

J.D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, S.C. 29602
(803) 242-6440
*Attorneys for C.H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, S.C. 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
STATE OF SOUTH CAROLINA
Rembert Dennis Building
Columbia, S.C. 29211
(803) 758-3970
*Attorneys for the State of South Carolina*

* Counsel Of Record For Each Petitioner

July 18, 1985

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[145] *Id.* (emphasis supplied).

[146] Pet. App. at 18a.

[147] *See* above at 18.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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No. 84-782

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STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

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On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

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## CERTIFICATE OF SERVICE

I, Lucinda O. McConathy, am a member of the Bar of the United States Supreme Court and the District of Columbia. I hereby certify that on July 18, 1985, pursuant to arrangement with the Clerk of the Court for a deferred joint appendix, I caused one typewritten page-proof copy of the Brief of Petitioners to be served on the following counsel for the parties. After the joint appendix has been prepared, printed copies of the Brief of Petitioners will be filed and served. In compliance with United States Supreme Court Rule 28, an envelope addressed to each listed address of counsel containing one copy of the Brief of Petitioners was deposited in the United States mail with first-class postage prepaid, except that a typewritten page-proof copy was sent by

Federal Express for delivery on July 19, 1985 to counsel for the Respondent, Don B. Miller, Esq., Native American Rights Fund, 1506 Broadway, Boulder, Colorado, 80302:

Jean H. Toal, Esq.
Jay Bender, Esq.
Belser, Baker, Barwick, Ravenel, Toal & Bender
1213 Lady Street
Columbia, South Carolina 29211

J.D. Todd, Jr., Esq.
Michael J. Giese, Esq.
Gwendolyn Embler, Esq.
Leatherwood, Walker, Todd & Mann
Post Office Box 2248
Greenville, South Carolina 29602

T. Travis Medlock
Attorney General
Kenneth P. Woodington, Esq.
Assistant Attorney General
State of South Carolina
Rembert Dennis Building
Columbia, South Carolina 29211

Robert M. Jones, Esq.
123 Workman Street
Rock Hill, South Carolina 29730

Mike Jolly, Esq.
Richard Steele, Esq.
113 West Main Street
Union, South Carolina 29379

John M. Spratt, Jr., Esq.
Spratt, McKeown & Spratt
26 West Liberty Street
York, South Carolina 29745

James D. St. Clair, Esq.
James L. Quarles, III, Esq.
William F. Lee, Esq.
David H. Erichsen, Esq.
Hale and Dorr
60 State Street
Boston, Massachusetts 02109

Nolen L. Brunson, Esq.
Post Office Box 851, CSS
Rock Hill, South Carolina 29730

B. Bayles Mack, Esq.
Palmer Freeman, Jr., Esq.
Post Office Box 128
Fort Mill, South Carolina 29715

C.W.F. Spencer, Jr., Esq.
Emil W. Wald, Esq.
Post Office Box 790
Rock Hill, South Carolina 29730

David R. Duncan, Esq.
W. Ryan Hovis, Esq.
1169 West Oakland Avenue
Suite C
Rock Hill, South Carolina 29730

O.G. Calhoun, Esq.
Post Office Box 2048
Greenville, South Carolina 29602

J. Buford Grier, Esq.
Suite 200, SCN Office Center
Rock Hill, South Carolina 29731-2891

Lynn B. Dutton, Esq.
General Solicitor
Norfolk Southern Corp.
185 Spring Street, S.W.
Atlanta, Georgia 30303

David A. White, Esq.
Post Office Drawer 551, CSS
Rock Hill, South Carolina 29730

R. Carl Hubbard, Esq.
Post Office Drawer 460
Lancaster, South Carolina 29720

William I. Ward, Jr., Esq.
W. Wallace Gregory, Jr., Esq.
Post Office 33189
Charlotte, North Carolina 28242

Parker Whedon, Esq.
101 North McDowell Street
Suite 226
Charlotte, North Carolina 28204

Phillip E. Wright, Esq.
Post Office Box 150
Lancaster, South Carolina 29720

Dan M. Byrd, Jr., Esq.
Mitchell K. Byrd, Esq.
Byrd & Byrd
240 East Black Street
Rock Hill, South Carolina 29730

/s/ Lucinda O. McConathy
LUCINDA O. MCCONATHY
*One Of The Attorneys For Petitioners*

Dated: July 18, 1985

No. 84-782



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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STATE OF SOUTH CAROLINA, *et al.*,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

## REPLY BRIEF OF PETITIONERS

---

JAMES D. ST. CLAIR, P.C.*
JAMES L. QUARLES III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

J. D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, SC 29602
(803) 242-6440
*Attorneys for C. H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, SC 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
State of South Carolina
Rembert Dennis Building
(803) 758-3970
Columbia, SC 29211
*Attorneys for the State of South Carolina*

* Counsel of Record for Each Petitioner

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## INTRODUCTION

To determine whether the Catawbas hold a special status under federal law permitting them to now pursue a claim that allegedly arose 145 years ago, requires the analysis and construction of a 1959 statute, 25 U.S.C. §§ 931-938, commonly referred to as the Catawba termination act.[1] In plain language, that statute explicitly declares that the Catawbas shall be ineligible for any special federal services for Indians, that federal Indian statutes shall not apply to them, and that state law shall apply to them. It also authorized the distribution of lands formerly held communally as reservation lands to individuals in fee.[2] Both the language of the statute and its legislative history reflect an intent by Congress to put the Catawbas "on the same status as other citizens with the same responsibilities."[3]

The Catawbas nevertheless ask this Court to affirm the court of appeals majority's rewriting of the statute. They ask that an unambiguous termination act be rewritten to afford them a special federal status permitting them to commence—at any time—an action to create an Indian reservation where cities and towns now govern and 27,000 innocent landowners hold title. Their arguments in support are contrary to the plain words of the statute, lack support in the legislative history, and would

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[1] The Catawbas suggest that describing 25 U.S.C. §§ 931-938 as the Catawba termination act is somehow inappropriate. *See* Respondent's Brief at 2 n.1. However, throughout the consideration and enactment of the statute both the Catawbas and the legislators referred to the statute as a termination act. *See, e.g.*, Brief of Petitioners at 18 nn.52-54. Moreover, this Court listed the Catawba act as "one of a series of termination statutes. . . ." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 133 n.1 (1972). Even a treatise authored in part by co-counsel for the Catawbas below and frequently cited by them in this Court, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), declares at page 174 that, after the 83rd Congress, "[s]ubsequent Congresses terminated [*inter alia*] . . . the Catawbas of South Carolina. . . ."

[2] *See* 25 U.S.C. § 933.

[3] July 10, 1959, Hearing Transcript at 10 (lodged with the Clerk).

produce a result completely opposite to the one Congress intended.

## ARGUMENT

### I. THE CATAWBA TERMINATION ACT UNAMBIGUOUSLY DIRECTS THAT STATE LAW APPLY TO THE CATAWBAS.

The Catawbas repeatedly lament that petitioners "would have the Court focus only on isolated statutory language," and "would have the Court look no further than the words of Section 5 for its result." [4] The Catawbas do not even quote, much less analyze, the critical provisions of the Catawba termination act. They avoid the words of the statute and endeavor to construct an argument which dismisses as irrelevant what this Court repeatedly has declared to be the appropriate starting point for construing a statute—its language.[5]

The second sentence of Section 5, 25 U.S.C. § 935, declares, in plain English, what will happen to the "tribe and its members" upon the effective date of the act:

> [T]he tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several states shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.

[4] Respondent's Brief at 16, 22.

[5] In a variety of contexts, including the construction of statutes involving Indians, this Court repeatedly has directed that statutory language clearly expressing congressional intent be given effect. *See Landreth Timber Co. v. Landreth*, —— U.S. ——, 105 S. Ct. 2297, 2301 (1985), *quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975); *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, —— U.S. ——, 105 S. Ct. 3420, 3432 (1985); *Rice v. Rehner*, 463 U.S. 713, 732 (1983); *National Broiler Marketing Assoc. v. United States*, 436 U.S. 816, 827 (1978), *quoting United States v. Sisson*, 399 U.S. 267, 297 (1970) ("[A] statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present day tastes' . . . . Considerations of this kind are for the Congress not the courts.").



As demonstrated in petitioners' opening brief,[6] ordinary English grammar compels the conclusion that the "tribe and its members" are the subject of the sentence, and each of the three following clauses explains what happens to "them," *i.e.*, the "tribe and its members." That sentence plainly dictates that state law apply to the Catawbas, both individually and collectively, and not special federal Indian statutes. Recognizing that Congress expressed its intent in clear and unambiguous language, the Solicitor General correctly concluded, "The fact is the Catawba Act is not equivocal." [7]

The Catawbas, nevertheless, attempt to manufacture some ambiguity. When they grudgingly discuss the words of the statute, they focus on a different sentence and assert:

> A careful reading of § 5 reveals that it is unclear whether . . . state law shall thereafter apply to both the Tribe and its members . . . and whether [special federal Indian] statutes . . . were rendered inapplicable to both the Tribe and its members or only to the individual members of the Tribe.[8]

As an illustration of the alleged ambiguity, the Catawbas point to the final sentence of Section 5: "Nothing in §§ 931-938 of this title [the Catawba termination act], however, shall affect the status of such persons as citizens of the United States." The Catawbas then assert that that sentence of Section 5 "plainly refers to individuals, its purpose being to preserve the citizenship status of individual Indians. *See* 8 U.S.C. § 1401(b)." [9]

[6] Brief of Petitioners at 32.

[7] Brief for the United States as *Amicus Curiae* in Support of the Petition for a Writ of Certiorari ("United States' Brief") at 15.

[8] Respondent's Brief at 38.

[9] Respondent's Brief at 50. The respondent's citation to 8 U.S.C. § 1401(b) is erroneous. That subsection deals with the loss of

Apart from the illogic of presuming that the third sentence of Section 5 somehow limits the sweep of the second sentence, the interplay of these provisions confirms that Section 5 was intended to (and did) terminate any status the Catawbas may have had as a tribe under federal law. 8 U.S.C. § 1401(a)(2) confers citizenship status at birth upon "a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe . . . ." Because the Catawba termination act ended any status the Catawbas may have had as members of a federal Indian tribe, it was necessary (or at least prudent) to include the final sentence of Section 5 to assure that the termination act would not be read to prevent them from qualifying for citizenship pursuant to 8 U.S.C. § 1401(a)(2). That the Catawba termination act—like all other termination acts—preserved the Catawbas' citizenship does not suggest that Congress intended that the full sweep of Section 5 be limited in any way.[10]

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citizenship by nationals and citizens who fail to reside within the United States for five years prior to reaching the age of 28. On the other hand, 8 U.S.C. § 1401(a)(2) governs the citizenship of persons born within the United States to members of an Indian tribe.

[10] Moreover, comparison of the Catawba termination act to the Ponca termination act, 25 U.S.C. §§ 971-980, conclusively demonstrates that protection of the citizenship of members of a terminated tribe could not have been intended to indirectly limit the scope of provisions making state law applicable and special federal Indian statutes inapplicable. Even the Catawbas are incapable of discerning a hint of ambiguity in the Ponca termination act's intent to make special federal Indian statutes inapplicable and state law applicable to *both* "the tribe and its members." *See* U.S.C. § 980. That termination act also preserves the "status of any Indian as a citizen of the United States," referring to individuals rather than the tribe. The Catawbas do not, and cannot, suggest how Congress' preservation of the citizenship of individual Indians in the Ponca termination act in any way limited Congress' intent to terminate both "the tribe and its members." Their suggestion that Congress' use of the term "such persons" in the comparable citizenship provision of the Catawba termination act limited the effect of the Catawba termination act is equally unavailing.



In a second attempt to create an ambiguity, the Catawbas compare the Catawba termination act to the 1958 California Rancheria termination act, arguing that similar language was used in those two acts and that the Rancheria and Catawba acts each made state law applicable only to individual California Indians and individual Catawbas, respectively.[13] The fundamental flaw in the Catawbas' argument is their erroneous premise that the Rancheria act "did not deal with tribal assets" and thus could not have affected a "tribe." [14] But, in fact, pursuant to the California Rancheria termination act, rancheria lands formerly held communally were distributed to individual community members.[15] Thus, contrary to the central premise of the Catawbas' argument, the Rancheria act affected collective entities and communal property as well as individual Indians.[16]

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[13] Respondent's Brief at 39-40.

[14] *Id.* at n.35.

[15] Section 1 of the Rancheria termination act states:

> That the lands, including minerals, water rights, and improvements located on the lands, and other assets of the following rancherias and reservations in the State of California shall be distributed in accordance with this Act. . . .

72 Stat. 619 (1958).

*See also Taylor v. Hearne*, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981) (tax sale affirmed of former rancheria land that had been distributed to a rancheria member pursuant to the termination act); *Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 258, 260-61 (N.D. Cal. 1981) (describing procedure by which California Rancheria Act was to become effective as to individual rancherias).

[16] The Rancheria termination act often referred to the affected "Indians," *not* because it applied only to individuals, but because the various listed bands and rancherias would be terminated only if they later voted in a referendum to be terminated. The legislation could not anticipate which rancherias would be terminated. W.C. Sturtevant, Ed., *Handbook of North American Indians*, Vol. 8, *California* (Heizer, Ed.), "Litigation and Its Effects" at 709-12; "Social Organizations" at 673-6. *See* Section 2 of 72 Stat. 619 (1958).

The Catawbas' third basis for contending that the Catawba act is ambiguous rests on yet another erroneous reading of a different termination act. The Catawbas note that the Ponca termination act describes the federal statutes that will be inapplicable after termination as those that "affect Indians or Indian tribes." The Catawbas argue that this was done to ensure that "the Ponca Tribe, as well as its members, would be among those . . . to whom state law would apply."[17] But the relevant sentence in the Ponca act is structured in exactly the same way as the second sentence of the Catawba act, and provides that "the tribe and its members" shall not be entitled to special federal services, nor shall federal Indian statutes apply to "*them*." The last clause of the sentence is identical to the Catawba termination act, providing that "the laws of the several states shall apply to *them*"—referring to the subject of the sentence, the "tribe and its members." *Cf.* 25 U.S.C. § 935 and § 980.

Despite the Catawbas' efforts, there is no ambiguity in the Catawba termination act. State law applies to "them," individually and collectively.

## II. THE CATAWBA TERMINATION ACT WAS NOT LIMITED TO REVOKING THE MEMORANDUM OF UNDERSTANDING.

The Catawbas argue that the Catawba termination act was intended only to revoke a 1943 agreement—the "Memorandum of Understanding"—between the Bureau of Indian Affairs, the Farm Security Administration, the Catawbas and the State of South Carolina.[18] However, it is inconceivable that Congress held hearings, solicited the views of the Bureau of Indian Affairs and the Catawbas, and enacted legislation bearing all the

[17] Respondent's Brief at 40.

[18] The Court of Appeals majority accepted that argument, concluding that the act was "intended only to end federal supervision and assistance arising out of the 1943 Memorandum of Understanding." Pet. App. 15a-16a.



hallmarks of termination legislation for the limited purpose of revoking an agreement which was entered into without legislation and which required no legislation to end. Furthermore, Congress did not even mention the Memorandum of Understanding in the statute, an extraordinary legislative oversight if its only purpose was to revoke that Memorandum. To the contrary, as the Solicitor General concluded, Congress plainly intended the Catawba act to terminate "all trust relationships between the federal government and the tribe concerned, whatever their source."[19]

That the Memorandum of Understanding was referred to by some of the witnesses at the hearings on the Catawba termination act is scarcely remarkable—it was the only existing specific arrangement for providing the Catawbas federal services. But those references do not suggest that the act was limited to revoking the Memorandum.

The Catawba termination act did far more than simply revoke the agreement between the federal administrative agencies, the Catawbas and the State of South Carolina. For example, Section 5 commands that "all statutes

[19] United States' Brief at 15. *See also* Brief of Petitioners at 36-40. The Catawbas advance no explanation why Congress would have employed the same process and the same language in the Catawba act as in the eleven other termination acts to produce a result dramatically different from the plain meaning of the words and the explicitly declared policy to end the special federal status of Indians and their tribes. Congress was pursuing the declared policy of "eliminat[ing] the reservations. . . ." *See, e.g.*, Wilkinson, *The Passage of the Termination Legislation*, in *Final Report to the American Indian Policy Review Comm'n*, in *Task Force Ten, Report on Terminated and Nonfederally Recognized Indians*, 1627 (October 1976) (U.S. Gov't Printing Office). The Chairman of the Senate Committee on Interior and Insular Affairs declared at the outset of the termination period, "If we have severed the cord which binds us to the Indians or the Indians to us, we want it completely severed, and not just a little strand left." *Joint Hearings on S. 2745 and H.R. 7320 Before the House and Senate Subcommittee of the Committees on Interior and Insular Affairs*, 83d Cong., 2d Sess. 250 (1954) (R. Vol. III, Ex. 7).

that affect Indians because of their status as Indians shall be inapplicable to them." Regardless of whether "them" refers only to individuals or to both the tribe and its members,[20] nothing in the Memorandum of Understanding purported to, or indeed constitutionally could, make special federal statutes applicable to the Catawbas.[21] This command would be superfluous unless it was intended to end any and all special relationships between the Catawbas and the United States which might cause special federal Indian statutes to apply.

The Catawbas' argument that the statute only revoked the Memorandum of Understanding renders numerous other provisions of the statute inoperative.[22] That is a result this Court has sought to avoid in construing federal Indian legislation. Indeed, "The elementary

[20] *But see* above at 2-8.

[21] *See United States v. Antelope*, 430 U.S. 641, 646 and n.7 (1977); *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

[22] Section 5 also commands that "the laws of the several States shall apply to them in the same manner they apply to other persons within their jurisdiction." Again, nothing in the 1943 Memorandum of Understanding prevented the application of state law to the Catawbas. The command that state law apply would be superfluous unless Congress intended to remove any barrier to the operation of state law arising from any source. To construe the act only to revoke the Memorandum would render this directive inoperative.

Section 5 also commands that "the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians." If Congress intended to terminate only those services rendered to the Catawbas pursuant to the Memorandum of Understanding, there was no need for the statute to remove the Catawbas' entitlement to "*any* of the special services" available to Indians, including those which would be available without regard to the existence of a Memorandum of Understanding. The Catawba act thus had the effect not only of ending services under the Memorandum but of ending the possibility of obtaining other services under other federal Indian statutes.

The provision in Section 5 protecting the Catawbas' citizenship similarly would be meaningless if the act only revoked the Memorandum, since the Memorandum had no effect on citizenship. *See also* Brief of Petitioners at 38, for still more examples.



canon of construction that a statute should be interpreted so as not to render one part inoperative" [23] was reaffirmed by this Court just last term.

### III. CONGRESS DID NOT INTEND TO PRESERVE FOREVER ANY CLAIM TO RECOVER LAND FROM THOUSANDS OF INNOCENT PERSONS.

There is no provision in the Catawba termination act which affirmatively preserves any federal claim—much less a claim which would dispossess 27,000 innocent landowners—from the effects of termination. Congress had, of course, preserved federal claims in termination statutes enacted both before and after the Catawba termination act.[24]

In the district court the Catawbas explained the absence of any language preserving the claim by the candid concession, "Here, of course, there is no indication that Congress was made aware of the Catawba claims." [25] Now the Catawbas attempt to convert the absence of any language concerning the claim into an affirmative decision by Congress that the claim would not be affected by the termination act. They contend that the Catawba termination act must be construed as if it were "a contract that was drawn up by the [BIA]." [26] The Catawbas' argument must be rejected because it rewrites history as well as the statute.

[23] *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, —— U.S. ——, 105 S. Ct. 2587, 2595 (1985) *quoting Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

[24] *See, e.g.*, 25 U.S.C. § 564t and 25 U.S.C. § 677r.

Nor is there any provision in the Catawba act that preserves any Catawba property rights from the effects of termination, although Congress sometimes specifically declared in other termination acts that state law would not apply for a period of time to particular Indian property interests. *See, e.g.*, 25 U.S.C. §§ 564m(a) and (b) and 25 U.S.C. § 752.

[25] Plaintiff's Memorandum in Opposition to Motion to Dismiss at 50 (filed 6/25/81 in the district court).

[26] Respondent's Brief at 12, 24.

There is no support for the Catawbas' present assertion that any claim they mentioned in 1959 was a Nonintercourse Act claim. The only claim ever mentioned was a claim against the State of South Carolina, which was never characterized in a way that would be recognizable as a claim to recover land from innocent persons.[27] For example, Catawba Chief Blue told the BIA program officer investigating the Catawbas' readiness for termination that "the State owe[d] them for the land" and that he would "rather have 'a handout' from the State with no law suit." [28] The Chief wrote in a letter included in the hearing records on the Catawba termination act that the State of South Carolina "owes us a great deal." [29] The 1959 tribal resolution that led to the Catawba termination act requested "that nothing in this legislation sh[ould] affect the status of any claim against the State of South Carolina by the Catawba Tribe." [30]

Because the only claim that was brought to the attention of Congress or the BIA at the time of the Catawba

[27] It is apparent from the Catawbas' own brief that any claim discussed in connection with the termination act was always referred to as a claim against the State. *See* Respondent's Brief at 11 (BIA program officer discussed claim against the *State* with a Catawba), 16 (Indians asked that claim against the *State* be unaffected by proposed legislation), 24 (Catawba Chief's letter asserting that the *State* owed the Indians "a great deal"), 27 n.20 (conceding that the claim was commonly described as a claim against the *State*).

The Catawbas' recitation of pre-termination act history confirms that the nature of the claim the Catawbas thought they had against the State of South Carolina was not a Nonintercourse Act claim. The Catawbas dispute whether the State performed its obligations under the 1840 treaty. *See* Respondent's Brief at 6, 27 ("The Tribe simply understood that the State had taken its 1763 Treaty lands and had not honored its agreement to buy new tribal lands . . . .").

[28] R. Vol. VI, Plaintiff's Ex. 53 at 6-7.

[29] July 10, 1959, Hearing Transcript, unnumbered insert.

[30] J.A. at 103.



termination act was a claim against the State,[31] Congress may have viewed the declaration in Section 6, 25 U.S.C. § 936, that the Catawba termination act would not "affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina" to be sufficient to preserve for the Catawbas the opportunity to bring a claim against the State. But Congress could not have thought that the claim under discussion was a claim against 27,000 innocent persons to recover the land the Catawbas conveyed to the State of South Carolina in 1840 and could not have intended to preserve that kind of claim.

To demonstrate how implausible it is to suggest that Congress intended to preserve from the operation of termination the Nonintercourse Act claim the Catawbas now assert, it is necessary only to examine what the contemporary understanding was in 1959 of the Catawbas' ability to assert such a claim. The Department of the Interior had specifically informed the Catawbas as early as 1909,[32] and continuously asserted until the First Circuit's 1975 decision in *Joint Tribal Council of Passa-*

[31] The Catawbas' brief frequently refers to their "1763 treaty claim" or their "reservation claim" or their "dispossession claim," as if those references appeared in the legislative history of the Catawba act. *E.g.*, Respondent's Brief at 16, 20, 22, 24. Those words were not used to describe the Catawbas' claim during consideration of the termination act, however, so it is scarcely remarkable that those words never appear in the statute.

[32] The Catawbas concede that more than 50 years before the Catawba termination act was passed they requested that the Department of Interior assist them in pursuing a Nonintercourse Act claim "but were rejected because the Catawbas were 'state Indians' for whom the Department concluded the United States had no responsibility." Respondent's Brief at 6. Indeed, the Catawbas acknowledge that as early as 1910 they were "advised by a federal Indian agent that they could not even get into court for a legal hearing on their claim." *Id.* at n.6.

*maquoddy Tribe v. Morton*,[33] that the Nonintercourse Act did not apply to tribes that were not federally recognized. That the court in *Passamaquoddy* held differently sixteen years *after* the Catawba termination act was passed cannot change the prevailing understanding of the scope of the Nonintercourse Act in 1959 when Congress legislated. Just last term this Court recognized that the appropriate focus for determining congressional intent is the *contemporaneous* understanding of the law, not the view of judges from a vantage point separated by decades from the events.[34]

The Catawbas also argue that the termination act should be construed as if it were a contract, regardless of congressional intent as expressed by the plain language of the statute. However, a termination statute is not a contract.[35] It is a legislative act. It is Congress' intent that must be determined, first by reviewing the language of the act, and, second, if necessary, by reviewing its legislative history.

If Congress' intent is to control, as it must, the Catawbas' argument must be rejected. The legislative purpose of the termination era was "to eliminate the reservations and to turn Indian affairs over to the states."[36] Only some form of legislative schizophrenia could explain why

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[33] *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 654-8 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975). No petition for certiorari was filed.

[34] *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, —— U.S. ——, 105 S. Ct. 2587, 2596 (1985).

[35] *See Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 264 (N.D. Cal. 1981), *citing Choate v. Trapp*, 224 U.S. 665, 671 (1912).

[36] *E.g.*, Wilkinson, *The Passage of the Termination Legislation*, in *Final Report To The American Indian Policy Review Comm'n.*, in *Task Force Ten, Report on Terminated and Nonfederally Recognized Indians*, 1627-49 (October 1976) (U.S. Gov't Printing Office).



Congress would enact termination legislation while simultaneously preserving a claim which might result in the *creation* of a new reservation, on which Section 5 made special federal services unavailable, special federal statutes inapplicable, state law applicable, and 3,434 acres of which were held in fee and subject to unlimited state jurisdiction and taxation. Senator Church had no difficulty discerning Congress' intent in enacting termination legislation when he declared, "An end is an end is an end."[37] And that, of course, is what the Catawbas were told when, in 1962, they again voted to accept the benefits of termination they then perceived—participation in the broader society and unrestricted individual ownership of land they were previously incapable of developing.[38]

Aided by hindsight, the Catawbas seek to undo the effects of termination and to obtain lands transferred almost a century-and-a-half ago. They seek to profit by substituting a present-day unfairness to 27,000 innocent landowners for what they claim was an unfairness in 1840. Their desires cannot alter the words of the 1959 Catawba termination act, however, or justify a judicial rewriting of the statute.

## IV. THE CATAWBA TERMINATION ACT DID NOT EXTINGUISH ANY TREATY RIGHTS BY MAKING STATE LAW APPLY TO THE CATAWBAS.

The Catawbas contend that the Catawba termination act cannot affect their claim for land because that would amount to an improper abrogation of treaty rights. They rely on Justice Douglas' decision in *Menominee Tribe of*

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[37] *Hearings on S. 869 and S. 870 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 87th Cong., 2d Sess. 18 (1961) (R. Vol. III, Ex. 9).

[38] *See* Record Vol. III, Ex. 22, J.A. 116, informing the Catawbas that the laws of United States which applied to tribes would no longer apply to them, state law would apply to them, and any special relationship with the federal government would end and the tribe would disband as a federal tribe.

*Indians v. United States*,[39] holding that the Menominees had a right under an 1854 treaty with the United States to hunt and fish as they had traditionally done which had not been extinguished by the Menominee termination act. That decision depended upon a unique set of facts and does not apply here.

The issue in this case, unlike *Menominee*, is the effect of the termination act on a claim that a federal statute was violated when the Catawbas transferred their interest in land, *not* the act's effect on any treaty right. The Catawbas transferred their only treaty right—the right to occupy land—in 1840. In contrast, the Menominees had never conveyed their hunting and fishing treaty rights. The issue in *Menominee* was, therefore, the effect of the termination act on treaty rights which the Menominees unquestionably held when the termination act was passed.

The Catawbas, however, attempt to invent another treaty right—a "treaty right" not to alienate their land interest.[40] They then assert that if the termination act made state law apply to their cause of action, it would extinguish a treaty right. But any treaty right the Catawbas once held was created in 1763 by a treaty with Great Britain, not the United States. That treaty reserved land for the Catawbas to occupy, but it created no "right" inhibiting them from transferring their interest. As the three dissenting court of appeals judges recognized, the 1763 treaty "contained no restrictions on alienating this property." [41]

The Catawbas suggest that a general proclamation by Great Britain in 1763 could somehow operate to bind the United States.[42] But any promises by Great Britain of

[39] *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

[40] Respondent's Brief at 2-4, 32-5.

[41] Pet. App. at 24a n.1.

[42] Respondent's Brief at 3.



special statutory or regulatory protection could not bind the new sovereign—the United States—after Great Britain lost the American Revolution. Indeed, in recognition that British regulation no longer operated, in 1782 the Catawbas petitioned the newly-formed United States to restrict the alienation of their land. In response, the United States gave the State of South Carolina authority to determine what measures should be taken on behalf of the Catawbas.[43] That request to the new sovereign, and the delegation of authority by the new sovereign to South Carolina, both confirm that there was no lingering effect of any British regulation.[44] These events demonstrate that the Catawbas held no treaty-based right to a special status and explain why the State of South Carolina understood the Catawbas to be within its jurisdiction.

Thus, the termination act was not, as the Catawbas contend, a "backhanded extinguishment" [45] of any treaty right when it ended any special federal status the Catawbas may have held.[46] Instead, that act only made state

[43] 1 Laws of the United States 607 (1815). *See also Cherokee Nation v. Georgia*, 30 U.S. 1, 36 (1831) (Baldwin, J. concurring).

[44] In 1783, shortly after the Treaty of Paris ending the American Revolution, Congress affirmatively declared its independent sovereignty and its sole and exclusive right to manage the affairs of Indians who were "not members" of any state. Congress also set about entering new treaties with various Indian tribes, declining to simply adopt previous treaties between Indians and Great Britain. *Id.*

[45] Respondent's Brief at 42.

[46] Even if the Catawbas had held some treaty right to special status, Congress had the power to abrogate that right and the termination act sufficiently expressed Congress' intention to end any special status. This Court explained in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.22 (1979) that where legislation is obviously inconsistent with a treaty right the right is abrogated. The Court rejected an argument based on the assumption that *Menominee* required Congress to specifically address a treaty right. The Court held that the rule

law, including the state statute of limitations, applicable to a claim for land.[47]

Further, *Menominee* itself turned on the construction of an additional statute, Public Law 280,[48] which the Court read *in pari materia* with the Menominee termination act.[49] Public Law 280, was made applicable to the Menominees by the same Congress which enacted the Menominee termination act,[50] and, because it specifically preserved hunting and fishing rights granted by federal treaty, Justice Douglas concluded that the particular hunting and fishing rights in issue survived the Menom-

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of construction that an intent to abrogate a treaty right is not to be lightly imputed:

> must be applied sensibly . . . . To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law . . . unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do.

[47] Even if this Court's decision in *County of Oneida v. Oneida Indian Nation*, —— U.S. ——, 105 S. Ct. 1245 (1985) can be read as holding that both common law and statutory claims may exist for the return of land, *Menominee* remains inapposite. The application of state procedures to either a common law or statutory claim does not extinguish any treaty right.

[48] Pub. L. No. 83-280, Act of August 15, 1953, ch. 505, 67 Stat. 588; *codified, as amended*, 18 U.S.C. § 1162 (1976), 28 U.S.C. § 1360 (1976) and 25 U.S.C. §§ 1321-1326 (1976).

[49] Lower courts have recognized that Justice Douglas' decision turned on his interpretation of Public Law 280. *E.g., Kimball v. Callahan*, 493 F.2d 564, 567-69 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974). And, at least one lower court has held *Menominee* controls only cases involving Public Law 280. *Sac & Fox Tribe v. Licklider*, 576 F.2d 145, 152-53 (8th Cir.), *cert. denied*, 439 U.S. 955 (1978).

[50] The peculiar history of Public Law 280 and the Menominee termination act may make it more reasonable to read Public Law 280 *in pari materia* with that termination act than with other termination acts. Public Law 280 as first passed conferred certain jurisdiction on Wisconsin except for the Menominees. The same Congress passed the Menominee termination act, and, only two months after passing the termination act, amended Public Law 280 to include the Menominees, at their request. *Latender v. Israel*, 584 F.2d 817 (7th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979).



inee termination act. In contrast, Public Law 280 does not apply to the Catawbas because Public Law 280 jurisdiction was never assumed by the State of South Carolina.[51] Moreover, Congress passed the Catawba termination act six years after Public Law 280 and, in doing so, made no mention of Public Law 280 or its limitation on the assumption of jurisdiction. For this additional reason, neither the holding nor the reasoning of *Menominee* applies to the Catawbas.[52]

In three decisions after *Menominee*, this Court has held that terminated Indians must enforce their property rights under the same laws as other citizens,[53] declared that state criminal law applies to terminated Indians,[54] and described termination acts as "subject-[ing] reservation Indians to the full sweep of state

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[51] 67 Stat. 588, *as amended*, 18 U.S.C. § 1162.

[52] Another basis for the holding in *Menominee* was Justice Douglas' analysis of the language contained in the Menominee termination act—and in virtually all other termination acts—which provided that "all *statutes* of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe." 25 U.S.C. § 899 (emphasis supplied). Justice Douglas reasoned that the reference to statutes (and not to treaties) revealed a congressional intention to terminate *statutory* privileges, rights and restrictions. The issue in *Menominee*, however, related to hunting and fishing rights which were guaranteed by a *treaty* and which the Menominees had not conveyed, abandoned, or otherwise relinquished. These treaty rights were preserved.

In contrast, in 1840, the Catawbas voluntarily conveyed whatever interest they had acquired under the 1763 treaty. Because these voluntary conveyances were in no way prohibited by the 1763 treaty, the plaintiff's claim to the land in issue arises from the asserted violation of a federal *statute*, the Nonintercourse Act. And in *Menominee*, Justice Douglas recognized that *statutory* rights and privileges were subject to all the effects of termination.

[53] *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 149-50 (1972).

[54] *United States v. Antelope*, 430 U.S. 641, 646-47 n.7 (1977).

laws."[55] Those decisions compel the conclusion that the Catawba termination act required the Catawbas to enforce their claim subject to the same laws as other citizens.

## V. STATE LAW COMPLETELY BARS THE CATAWBAS' CLAIM.

The Catawbas argue that, even if state law applies to their claim, the claim is not completely foreclosed. They suggest that South Carolina law places a burden on each defendant to prove that he has been in possession of his land for the ten years required to establish adverse possession. If a defendant has not been in possession for that length of time, the Catawbas contend that their claim is not barred as to that defendant.[56]

As previously demonstrated,[57] the Catawbas have confused the statute of limitations (which requires that a *plaintiff* have been in possession, actual or constructive, of the land he claims)[58] with the adverse possession statute (which allows a *defendant* to establish title by showing ten years of continuous possession).[59] In their most recent brief, the Catawbas have further confused the operation of the two statutes by asserting that the ten-year statute of limitations period may only be asserted by an adverse possessor who has been on the land for at least ten years.[60] Of course, such a construction would render the statute of limitations superfluous.

A closer reading of the relevant statutes reveals that: (1) a plaintiff cannot maintain an action to recover real property unless he has been in possession within ten years of commencement of the action (§ 15-3-340); (2)

[55] *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976).

[56] Respondent's Brief at 46-50.

[57] Brief of Petitioners at 26-7 and n.83.

[58] S.C. Code Ann. § 15-3-340 (Law. Coop. 1976).

[59] S.C. Code Ann. § 15-67-210 (Law. Coop. 1976).

[60] Respondent's Brief at 48.



a person who establishes "legal title"[61] to the land will be presumed to have been in possession for purposes of the statute of limitation (§15-67-210); and (3) where a plaintiff establishes "legal title," a defendant can only establish a superior title by proving ten years continuous possession (which will disprove the presumed ten years of possession of the person holding "legal title") (§ 15-67-210). A defendant must prove ten years of adverse possession only where the plaintiff has first cloaked himself in a rebuttable presumption that he can meet the requirement of possession imposed by the statute of limitations by showing "legal title". If a plaintiff has not shown "legal title," however, and cannot prove that he actually was in possession of the land within the last ten years, then the statute of limitations bars his claim. That is precisely the case at hand. The current holders of record title have the "legal title" contemplated by the South Carolina statute,[62] not the Catawbas, so the defendants are not required to rebut any presumption of possession.

[61] South Carolina treats "legal title" as record title, and distinguishes it from a claim to ownership or other such beneficial interest. *See, e.g., Parr v. Parr*, 268 S.C. 58, 231 S.E.2d 695 (1977) (where son transmitted deed to father but it remained unrecorded in a safe, "legal title remains in [the son] under the recorded deed."). *See also State v. Jeffcoat*, 279 S.C. 167, 303 S.E.2d 855, 856 (1983) (false pretenses convictions upheld where defendants "did not disclose to purchasers that they did not have legal title. . . . Other than complete lack of ownership, we know of no greater encumbrance to a land transfer than a lack of legal title."); *FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 237 S.E.2d 50 (1977) (judgment lien statute inapplicable to "vendee's equitable title" but would apply to "legal title.").

[62] *Haithcock v. Haithcock*, 123 S.C. 61, 69-70, 115 S.E. 727, 729-30 (1923) ("[I]f one shows paper title . . . then the law presumes that he was in possession of that land . . . ."). The Catawbas cannot produce such a paper title, although they may point to the 1763 treaty, because the most recent document relating to their interest in this land is a conveyance, the 1840 treaty. Muniments of title are held by others.

Furthermore, since the Catawbas have conceded that they have not possessed the land in issue since 1840, 140 years before they commenced this action, and have conceded that fee title was in the State of South Carolina,[63] it is indisputable that the statute of limitations bars their claim. No presumptions are relevant.[64]

## CONCLUSION

For all of the reasons set forth here and in the Brief of Petitioners, as well as in the United States' Brief, the decision of the court of appeals majority should be reversed.

Respectfully submitted,

JAMES D. ST. CLAIR, P.C.*
JAMES L. QUARLES III
WILLIAM F. LEE
DAVID H. ERICHSEN
HALE AND DORR
60 State Street
Boston, MA 02109
(617) 742-9100
*Attorneys for the State of South Carolina, et al.*

JOHN C. CHRISTIE, JR.*
J. WILLIAM HAYTON
STEPHEN J. LANDES
LUCINDA O. MCCONATHY
BELL, BOYD & LLOYD
1775 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 466-6300
*Attorneys for Celanese Corporation of America, et al.*

J. D. TODD, JR.*
MICHAEL J. GIESE
GWENDOLYN EMBLER
LEATHERWOOD, WALKER, TODD & MANN
217 E. Coffee Street
Greenville, SC 29602
(803) 242-6440
*Attorneys for C. H. Albright, et al.*

DAN M. BYRD, JR.*
MITCHELL K. BYRD
BYRD & BYRD
240 East Black Street
Rock Hill, SC 29730
(803) 324-5151
*Attorneys for Springs Mills, Inc., et al.*

T. TRAVIS MEDLOCK *
Attorney General
KENNETH P. WOODINGTON
Assistant Attorney General
State of South Carolina
Columbia, SC 29211
Rembert Dennis Building
(803) 758-3970
*Attorneys for the State of South Carolina*

* Counsel of Record for Each Petitioner

December 3, 1985

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[63] Respondent's Brief at 5-6, 19 n.14.

[64] The application of a ten-year statute of limitations is consistent with South Carolina's general policy regarding claims to recover land. For example, another South Carolina statute of limitations requires a person who has been subject to a disability that tolled the running of the statute of limitation on land claims to bring any action to recover land *within ten years* after the date the disability ends. S.C. Code Ann. § 15-3-370 (Law. Coop. 1976 and Supp. 1984). *See also* Brief of Petitioners at 23-6, 28-9.

No. 84-782

In The
# Supreme Court of the United States
October Term, 1985

STATE OF SOUTH CAROLINA, et al.,
*Petitioners,*

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## RESPONDENT'S BRIEF

Don B. Miller
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Jean H. Toal
BELSER, BAKER, BARWICK, RAVENEL, TOAL & BENDER
1213 Lady Street, Suite 303
P.O. Box 11848
Columbia, SC 29211
(803) 799-9091

Robert M. Jones
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

Mike Jolly
Richard Steele
113 West Main Street
Union, SC 29379
(803) 427-8471

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

## QUESTION PRESENTED

In 1943, the Secretary of the Interior took 3,434 acres into trust for the Catawba Tribe. Sixteen years later, the Tribe and the federal government agreed to end the federal trust over this tract, but only on the condition that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." Basing its action on tribal consent, Congress enacted the 1959 Catawba Division of Assets Act for the purpose of distributing the 3,434 acres. The question presented is:

Whether, in addition to distributing the 3,434 acres, Congress also intended to violate the condition upon which tribal consent was obtained and *sub silentio* extinguish or limit the Tribe's long-standing claim to its 144,000-acre 1763 Treaty lands.

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## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

In 1760 and 1763, the British Crown entered into treaties with the Catawba Indian Tribe under which the Tribe ceded vast portions of its aboriginal territory in return for the Crown's guarantee of protection for a 15-mile-square, 144,000-acre reservation. In 1840 the State of South Carolina, without the knowledge, consent, or participation of the United States, negotiated a "sale" of the Catawba Reservation, promising it would purchase a new reservation elsewhere for the Tribe. South Carolina took possession of the Treaty Reservation but failed to acquire a new reservation for the Tribe. In 1842, after the Tribe had wandered homeless for almost three years, the State bought back a 630-acre tract of the original Reservation as a "new" reservation for the Tribe. The State continues to this day to hold this tract in trust for the Tribe.

In 1980, after more than a century of unsuccessful efforts to resolve its claim legislatively and administratively, including 1905 and 1909 administrative petitions to the Secretary of the Interior, the Tribe filed suit seeking the return of its Treaty Reservation. The Tribe seeks a declaration that it acquired, in 1763, a protected, recognized property right through its treaties with Great Britain and that since the adoption of the United States Constitution, its reservation lands have been protected by federal law. As a result, the 1840 "treaty" between the State and the Tribe is void, and the subject lands retain to this day their status as Indian tribal lands.

The question to be determined by the Court is whether the Tribe's federal law right to possess its 1763 Treaty land was taken away *sub silentio* in 1959 when Congress acted to distribute among tribal members 3,434 acres of land that the United States and South Carolina had acquired in 1943 for the purpose of rehabilitating the Tribe.

### II. THE PROCEEDINGS BELOW AND THE ISSUES FOR REVIEW

The district court postponed class certification and filing of answers in favor of first considering petitioners' motion for summary judgment based solely on the effects

of the 1959 Catawba Division of Assets Act.[1] 73 Stat. 592, 25 U.S.C. §§ 931-938 ("1959 Act"). The district court then granted summary judgment for petitioners by adopting *verbatim* their proposed findings of fact and conclusions of law.

For purposes of summary judgment, petitioners' motion necessarily assumed that, until the effective date of the 1959 Act:

(1) the Catawba Tribe possessed a vested, constitutionally-protected property right in its 144,000-acre 1763 Treaty Reservation;

(2) the 1763 Reservation was subject to the same federal constitutional, statutory, and common law protection as other federal treaty reservations; and

(3) neither the Tribe's property interest nor its federally-restricted status was validly disturbed until 1959, *i.e.*, the 1840 state treaty was void.

The only question before the Court is whether the 1959 Act implicitly extinguished, in abrogation of an express understanding with the Tribe, the federally-protected status of an additional 140,000 acres of Treaty lands over and above the 3,434 acres that it was intended to affect. The Court of Appeals held that the 1959 Act did not have this effect, finding that it dealt only with the distribution of the 3,434 acres administratively acquired 16 years earlier.

## III. FACTS

### A. The 1763 Treaty Of Augusta.

In 1760, the Catawba Tribe and His Majesty's Superintendent of Indian Affairs entered into the Treaty of Pine Tree Hill, whereby the Catawba Tribe ceded its remaining aboriginal territory in return for "being quietly settled in a Tract of only fifteen Miles square . . ." Lt.

[1]Petitioners uniformly refer to this 1959 Act as the "Catawba Termination Act." *See, e.g.*, Pet. Br., Table of Contents. This is petitioners' own label for the 1959 Act created for this lawsuit. Congress' title for the 1959 Act is the "Catawba Indian Tribe Division of Assets Act." 73 Stat. 592; 25 U.S.C. § 931 (1982). Its stated purpose is to "provide for the division of tribal assets of the Catawba Indian Tribe of South Carolina among the members of the Tribe . . ." *Id.* Neither the word "terminate" nor any of its variants appears in the title or text of the Catawba Act.



Governor Bull to South Carolina General Assembly, October 14, 1760, S.C. Commons House Journal, No. 33, pt. 2, 14 (R. Vol. VI, Ex. 3). In 1763, the Crown issued a proclamation forbidding the colonial governors from patenting or authorizing surveys of Indian lands and forbidding private land purchases or settlement on Indian lands (R. Vol. VI, Ex. 4). The Proclamation of 1763 was the definitive statement of British Indian policy and continued in force until the American Revolution.[2]

Shortly after issuing the 1763 Proclamation, the Crown convened a treaty conference at Augusta with the Chickasaw, Choctaw, Cherokee, Creek and Catawba Tribes. Because the terms of the 1760 Treaty of Pine Tree Hill had not been honored by the British, the Catawbas renewed their claims to a larger area. The governors told the Catawbas that "our King and Father holds out his arms to receive and protect you from all your enemies and . . . you may be assured of his confirming to you all your just claims to your Lands and Hunting Grounds pursuant to [the Treaty of Pine Tree Hill]." Colonial Records of North Carolina, Vol. 2, 198 (1890) (J.A. 30). The Governors urged the Catawbas to stand by their former agreement and promised that the Treaty obligations would be fulfilled. The Catawbas agreed, and Article IV of the Treaty of Augusta provides:

> And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

[2]Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548-49 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 594-98 (1823); see Clinton and Hotopp, Judicial Enforcement of the Federal Restraints on alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 22 (1979).

*Id.* at 201-02 (J.A. 35). Following the Treaty, the Reservation was surveyed and a fort built for the Tribe's protection.[3]

**B. Attempted State Extinguishment—The 1840 "Treaty" Of Nation Ford.**

During the Revolutionary War, the Catawba Tribe fought alongside the Colonists against the British. Following Independence, the United States recognized the

[3]In 1772, the Crown actively protected the Tribe's possession, opposing a plan by members of the South Carolina General Assembly to lease the Catawba Reservation to one of its own members. John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the 1763 Treaty, wrote the South Carolina Governor:

> The Land now Occupied by the Catawba Indians being a parcel of Fifteen Miles Square was, as well as a very considerable Extent of Country besides possessed by them when the Subjects of England first Settled in this part of the World; At the Congress held at Augusta in 1763, by the Governors of Virginia So. & North Carolina & Georgia and the Superintendant of Indian Affairs in the Southern District. The said parcel of Land of Fifteen Miles Square, being judged by the Remains of the Said Once numerous and powerfull Nation . . . to be Sufficient for their Support & Maintenance . . . and in Consideration of their Having Voluntarily relinquished their Claims to a very extensive Territory as also of their Having been always faithfully & Cordially Attached to the British Interest, was in the most Solemn Manner reserved for their use by Treaty to the Observation of which the said Governor and Superintendant bound Themselves & their Successors.
>
> The Catawbas never have by any Treaty or Publick Act Ceded the Land so Reserved to them by said Treaty of Augusta in 1763 to His Majesty, and Such a Cession cannot be Negotiated for or accepted of, for & on Behalf of His Majesty, by any other person, than His Agent for & Superintendant of Indian Affairs without a Manifest Violation of His Majesty's Orders . . .
>
> Your Excellency & the Honorable Council, cannot in my humble Opinion with any Propriety or Shadow of Right grant or lease the Whole or any Part of the Catawba Lands for any purpose or upon any Pretence whatsoever untill they shall have been first Ceded by said Indians to the Superintendant for His Majesty, without a Violation of every Order and Instruction Relative to Indian Lands.

Great Britain, Public Records, Colonial Office, Class 5, Vol. 74, pp. 85-87 (R. Vol. VI, Ex. 7).



Catawbas' title to their 1763 Treaty lands,[4] but neither entered into new treaties or agreements with nor provided services to the Tribe for 160 years, until 1943. While the Colony, and later the State of South Carolina, initially recognized the validity of the 1763 Treaty guarantees (R. Vol VI, Ex. 8, 10, pp. 19-22), increasing pressure from settlers in the area resulted in the enactment of several State statutes in the early 1800's—all without federal approval—purporting to authorize leasing of Catawba tribal lands to non-Indians (R. Vol. VI, Ex. 10). By the 1830's, nearly all of the Catawba Treaty lands had been leased to non-Indians in violation of federal law, and the lessees began pressuring the State to extinguish the Tribe's title (R. Vol. VI, Ex. 10, 11 & 12). In 1838, South Carolina conveyed its pre-emptive rights in the Catawba lands to the non-Indian lessees (R. Vol. VI, Ex. 10, pp. 20-22). The State's initial efforts to convince the Catawbas to sell were rebuffed by the Tribe, but in 1840 the State succeeded in "negotiating" the "Treaty" of Nation Ford whereby the Tribe purportedly relinquished its 144,000-acre tract in return for South Carolina's promise to spend $5,000 to acquire new tribal land in North Carolina or some unpopulated area of South Carolina (J.A. 38).[5] The South Caro-

[4]In 1782, Congress, operating under the Articles of Confederation, recognized the Tribe's claim to occupy its Treaty Reservation, and urged South Carolina to take whatever steps it deemed necessary "for the satisfaction and security of said tribe . . ." Journals of Congress, Saturday, Nov. 2, 1782. In 1825, President James Monroe and Secretary of War John Calhoun reported to the Senate that the Catawbas were among those "tribes" which still "held" lands "within our States." American State Papers, Indian Affairs, Vol. II 541 (1834), *Plan For Removing The Several Indian Tribes West Of The Mississippi River* (Jan. 27, 1825). A War Department chart attached to the report indicates that the Catawba Tribe comprised 450 persons and claimed 144,000 acres in South Carolina. *Id.* at 545.

[5]A 1908 legal memorandum submitted to the Department of the Interior states:

> The Indians assert that this treaty was obtained by opening a barrel of whiskey, hanging tin cups around the barrel, and allowing each Indian to help himself. They are prepared to make affidavit to the fact that this is the generally accepted version and statement among all their people.

Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906 (R. Vol. V at 23, n.30).

lina legislature ratified the "treaty" and in turn authorized the issuance of patents to the leaseholders who occupied the land (R. Vol. VI, Ex. 10, pp. 23-24).

The United States was not a party to and did not participate in the 1840 "treaty" (R. Vol. VI, Ex. 10).

Nor did South Carolina perform its duties under the "treaty." The State did not purchase new lands, and the Tribe wandered homeless for more than two and one-half years. In 1842, the State purchased for $2,000 a 630-acre tract located entirely within the boundaries of the 1763 Treaty lands (R. Vol. VI, Exs. 13, 14). This "new" reservation comprised less than one-half of one percent of the 1763 Treaty lands. The 630-acre tract continues to this day to be held in trust for the Tribe by the State as an Indian reservation (R. Vol. VI, Ex. 15).

### C. Events Leading To The 1943 Memorandum Of Understanding.

#### 1. Early Tribal Attempts To Regain Possession.

In the century following the "Treaty" of Nation Ford, the Catawba Tribe made numerous appeals to both the State and Federal Governments to regain possession of at least a portion of its Treaty lands. In 1905 and 1909, the Catawba Tribe petitioned the Department of the Interior to assist the Tribe to regain possession. The Tribe's petitions were based on the Nonintercourse Act but were rejected because the Catawbas were "state Indians" for whom the Department concluded the United States had no responsibility (R. Vol. VI, Exs. 18, 20). During the period 1900-1930, the Catawbas made numerous appeals to the State of South Carolina seeking citizenship and "final settlement of all their claims against the state" (R. Vol. VI, Ex. 25). Although a 1908 South Carolina Attorney General opinion concluded that the 1840 treaty was valid and that its terms had been fulfilled (R. Vol. VI, Ex. 10), the State's Governor and Legislature generally acknowledged the legitimacy of the tribal claim and a number of state investigative committees were appointed, but no action was ever taken[6] (R. Vol. VI, Exs. 19, 23, 25, 28, 30).

[6]In 1910 The Tribe was advised by a federal Indian agent that they could not even get into court for a legal hearing on their claim and that they should be content with a reasonable grant from the State Legislature (R. Vol. VI, Ex. 21, pp. 11-12, 16, 21).



#### 2. Early Efforts To Secure Federal Assistance For The Catawbas.

Following 1930 field hearings in Rock Hill, South Carolina, by a subcommittee of the Senate Committee on Indian Affairs,[7] at which Catawba Chief Blue testified that the State had taken the Tribe's 144,000-acre Treaty Reservation and left the Tribe poverty stricken, attention again focused on securing federal assistance for the Tribe.[8] Senator Thomas of Oklahoma, a member of the Senate Subcommittee that visited the Reservation in 1930, wrote in 1932 that the "subcommittee . . . found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." *Division of Tribal Assets of Catawba Indian Tribe, Hearings on H.R. 6128, Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 86th Cong., 1st Sess. (unpublished) (*"Hearings"*), Insert 5 at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (R. Vol. VI, Ex. 56), *quoting* Feb. 10, 1932 letter, Senator Thomas to Commissioner Rhoads. Senator Thomas later described the Catawba Tribe as "the most pathetic and deplorable Indian Tribe that I have discovered in the United States." *Hearings on S. 2755 and S. 3654, Before Senate Comm. on Indian Affairs,* 73d Cong., 2d Sess. 263 (1934).

The State began to actively seek assistance from the federal government, both for the purposes of providing relief and securing a final settlement of the Tribe's claim arising out of the 1840 "treaty" (R. Vol. VI, Exs. 33, 34, 35, 36, 45, 46, 47, 48). In 1937 and 1939, legislation was introduced in Congress authorizing general federal super-

[7]*Survey of Condition of the Indians in the United States,* Sen. Doc. No. 92, 71st Cong., 2d Sess. 7535 (1930).

[8]In 1929, Chief Samuel Blue had written the United States Commissioner of Indian Affairs, informing him that the Chief was to appear before the State Legislature, seeking "final settlement from South Carolina on land lease, which has been standing for over 130 years," and asking how the BIA "settled" with Indians of other reservations so he would have an idea what to request (R. Vol. VI, Ex. 30).

vision of the Catawbas on the condition that the State purchase additional lands (R. Vol. VI, Exs. 32, 39).[9]

**D. The 1943 Memorandum Of Understanding.**

With the failure to secure legislation authorizing assumption of general federal supervision, the Catawbas' Congressman and the Interior Department began to explore administrative alternatives for establishment of a program to "rehabilitate these Indians." 90 Cong. Rec. A2091-92 (May 2, 1944) (Remarks of Rep. James P. Richards) (R. Vol. VI, Ex. 43). This effort, which began in 1940, focused on the development of a joint assistance program by the state and federal governments. The State initially conditioned its participation upon a release and quit-claim by the Tribe of its claims arising out of the 1840 treaty (R. Vol. VI, Ex. 45), but the Interior Department refused to agree to extinguishment of the tribal claim as a condition for establishing a rehabilitation program (R. Vol. VI, Exs. 47, 48, 50) (J.A. 43-44)[10]

[9]The State sought to leverage its support of the 1937 legislation into a "final settlement" of the Tribe's 1840 taking claim (R. Vol. VI, Exs. 33, 34, 35). The BIA investigated the matter, however, and prepared a report documenting the Reservation's history and the State's failure to comply with the terms of the 1840 "treaty" (R. Vol. VI, Ex. 36). Neither bill was reported out of committee, despite formal action in support of the 1939 bill by the South Carolina Legislature authorizing the State Budget Commission "to negotiate and enter into an agreement with the Federal Government having as its objective the rehabilitation of the Catawba Indians and a final settlement with them so that the State may be relieved of their support" (R. Vol. VI, Ex. 41).

[10]Early drafts of the cooperative agreement, known as the Memorandum of Understanding, had contained a provision purporting to extinguish the Tribe's reservation claim (R. Vol. VI, Ex. 49), but that provision was deleted in 1941. The Solicitor of the Department of the Interior confirmed BIA's position that the Agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." Mem. Sol. Int., Jan. 13, 1942, "Re The Memorandum of Understanding, etc." *reprinted in* I *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974*, 1080, 1081-82 (Gov't. Printing Office, n.d.) (*"Interior Opinions"*) (J.A. 43-

(Continued on next page)



The State agreed to participate in the rehabilitation program without the extinguishment provision and on December 14, 1943, the Secretary of the Interior approved the Memorandum of Understanding between the Tribe, the State and the Department of the Interior. It contained no language concerning extinguishment of the Tribe's claim. The Memorandum clearly defined its purpose as limited to rehabilitation of the Catawbas and securing them "equal treatment with other citizens . . ." (J.A. 45).

Pursuant to the Memorandum, the State of South Carolina acquired 3,434 acres of farm land close to the existing 630-acre state reservation at a cost of $70,000 and conveyed the lands in trust to the Secretary of the Interior. The State did not convey the 630-acre reservation to the Secretary.

**E. The 1959 Catawba Division Of Assets Act.**

In the 1950's, the BIA began to consider withdrawing from its obligations to provide services under the 1943 Memorandum of Understanding. The federal presence at Catawba was of fewer than 15 years duration and had been consistently minimal. *Hearings* at 87-88; *see* R. Vol. III, Exs. 11, 12, 13. Federal interest in withdrawal coincided with tribal dissatisfaction over the inability of members to secure financing for farm operations and home building and improvement. The lack of federal services, coupled with federal restrictions on the alienation of any interest in reservation lands, meant that much of the newly acquired 3,434-acre tract could not be productively used (R. Vol. VI, Exs. 54, 56; R. Vol. III, Ex. 22).

In 1956, Catawba Chief Blue publicly expressed dissatisfaction: "The agreement called for a rehabilitation program for us, but nothing has been done about it so far

(Continued from previous page)

44). The Solicitor also examined the source of the Department's authority to enter into the Memorandum. Noting that the "Federal Government did not take jurisdiction over these Indians until the fiscal year 1941, when the Interior Department Appropriation Act appropriated $7,500 for the relief of the Catawba Indians," the Solicitor concluded that the special appropriation "implies the grant of such jurisdiction for the purposes for which the funds were appropriated." *Id.* at 1080-81 (J.A. 40-41).

to help the Catawbas." *Hearings* at 4-5, Insert 1 (Letter to the Editor, Rock Hill Evening Herald, May 9, 1956). Shortly thereafter, BIA officials met with the Tribe at the Reservation and discussed in detail the 1943 Memorandum of Understanding and the services provided pursuant to its terms. *Hearings* at 5 and Insert 2.

In 1957 and 1958, Congressman Robert W. Hemphill sponsored large public meetings among the BIA, the Tribe and State officials in an effort to resolve the problems raised by the Tribe. *Hearings* at 6. At the 1957 meeting, BIA Associate Commissioner H. Rex Lee explained that the BIA offered "very little in the way of services" and that the BIA's ability to provide services was limited by the Memorandum of Understanding "as there had never been any treaties or agreements prior to the Memorandum of Agreement." *Hearings,* Insert 4 at 1-3 (Minutes of Dec. 20, 1957 meeting). Nonetheless, the Associate Commissioner stated that it was "the desire of the Bureau of Indian Affairs to work with the Catawbas and continue to assist them . . . ." *Id.* at 1

At the 1958 meeting, a special BIA program officer detailed the history leading to the Memorandum of Understanding, its principal provisions, and the steps that had been taken to make it effective. *Hearings,* Insert 5 (Minutes of Oct. 21, 1958 meeting) (R. Vol. VI, Ex. 56). Associate Commissioner Lee then told the Tribe "[y]our main problem is inadequate housing—the main reason being, it is impossible to borrow money. The land status has been deterior [sic] to the Indians because of the restricted status of land . . . ." Lee suggested to the Tribe that federal funds were not the answer to the Catawbas' problems, but rather the solution lay in each family acquiring title to its lands. *Hearings,* Insert 5 at 7 (R. Vol. VI, Ex. 56). Lee stated that the "[m]echanics to get lands back into the hands of the Indians" would be to reach agreement among the Indians and then approach Congress to "get the necessary legislation." Lee further told the Tribe that he knew "that you do not want to see the Tribe broken up. You might try some possible fee-simple agreements which



would be entirely feasible, but must have some help from the Congress." *Id.*

Following the October 21, 1958 meeting, the BIA Program Officer met with numerous tribal leaders in their homes "to acquaint them further with possible solutions to their problems as well as the procedure necessary to carry them out." Jan. 30, 1959, Program Officer to Chief, Branch of Tribal Programs, at 2 (R. Vol. VI, Ex. 53). The program officer's report shows that a number of tribal officials expressed concern about the status of the Tribe's claim against the State, but were assured by the program officer that the Tribe's claims would be unaffected by the BIA's proposal to distribute tribal assets.

> Had a long talk with Willie Sanders again after he had time to read my report. First, he talked about a settlement with the State before anything else could take place, but I told him that any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government [for the distribution of assets] . . . .

(R. Vol. VI, Ex. 53 at 7; *see also* pp. 8-9, 14, 16-17).

At a January 3, 1959 tribal meeting, the Catawba Tribe agreed to the federal withdrawal program and adopted a tribal resolution drafted for the Tribe by the BIA. *Hearings* at 8. The tribal resolution requested the removal of federal restrictions on the Tribe's "3,388.8 acre reservation in York County." *Hearings,* Insert 6 (J.A. 102).[11] The tribal resolution was based solely upon the inability of members to "obtain credit to build homes . . . or to improve or develop the property." *Id.* The resolution specifically conditioned tribal support of division of assets legislation on preserving intact the Tribe's longstanding Treaty claim: *"and that nothing in this legislation shall*

[11] In 1957, Congress authorized the transfer of "approximately forty-nine" acres of the land acquired pursuant to the 1943 Memorandum of Understanding to the City of Rock Hill. Act of May 17, 1957, 71 Stat. 31. To avoid confusion, we refer to the lands distributed pursuant to the 1959 Act as "3,434 acres," although in fact only 3,383.8 acres were affected by the Act.

*affect the status of any claim against the State of South Carolina by the Catawba Tribe." Id.* (emphasis added) (J.A. 103).[12]

On January 26, 1959, Congressman Hemphill requested BIA Associate Commissioner Lee to draft legislation "to accomplish the desires [of the tribe] set forth in the Resolution. I believe it will be of great benefit to the Tribe, both individually and collectively . . . ." (J.A. 50).

On March 28, 1959, the Congressman presented the BIA's draft bill to the Tribe, reading it to the members "line by line". *Hearings* at 9. According to the BIA's minutes of the meeting, the Congressman also read the tribal resolution and told the Tribe that he had had the "legislation drawn up to carry out the intent of the resolution." (J.A. 111). Congressman Hemphill stated that Associate Commissioner Lee had told him on his first trip to Washington that BIA services under the Memorandum of Understanding could not be expanded and that, "in his [Hemphill's] opinion, the [1943] memorandum of understanding had been of no advantage to the Tribe." (J.A. 112). Congressman Hemphill assured the Tribe that no legislation would be introduced without the Tribe's approval. *Id.* Referring to the draft bill as a "contract that was drawn up by the [BIA]" (J.A. 106, 107), the Tribe then approved the introduction of the bill by a vote of 40 to 17 and it was introduced on April 7, 1959.

The Congressman's introductory remarks note that the Tribe "just voted a resolution to have me introduce a bill" and cite the Tribe's need to have title to its "4,000 acres" so that members might no longer be excluded from "the privileges of development." 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 116).

Congressman Hemphill's testimony before the House Interior Subcommittee described the problem to be remedied by his bill solely in terms of tribal members' inability

[12]Petitioners incorrectly assert that the Tribe's January 3, 1959 resolution was not "before Congress" (Pet. Br. at 40, n. 116). The resolution is a part of the July 10, 1959 hearing record, however, having been introduced by the bill's sponsor. *Hearings* at 8, 13



to "borrow any money on community property" as a result of an agreement "in 1944 [sic] which was . . . worthless . . . ." *Hearings* at 7. The Congressman assured the subcommittee that his bill was based upon the Tribe's consent as expressed in the January 3, 1959 tribal resolution:

> I refused to introduce a bill until the Catawba Indian Tribe requested it. On January 3, 1959, the Catawba Tribe passed the following resolution—I ask permission to insert that resolution at this point as a part of the record.
>
> As a result of that resolution, I asked the Bureau of Indian Affairs to assist me in the preparation of a bill, and I introduced the bill which is before you today.

*Hearings* at 8. Associate Commissioner Lee's testimony before the Interior subcommittee confirmed to Congress that the legislation had been drafted to conform to the wishes of the Tribe:

> After this meeting they petitioned their Congressman to introduce a bill. The Congressman asked us for drafting service, and we drafted a bill along the lines that we thought the Indians had been discussing.
>
> After the bill had been drafted, however, we advised Congressman Hemphill that before we could report favorably on the bill we thought a specific bill should be presented to the Indians and explained to them in detail so we could be sure this was the type of program they wanted. This was done at the March 28 meeting . . . .

*Hearings* at 84.

The reports of the House and Senate Committees are virtually identical, stating that the Act's purpose is to "provide for the division of the tribal assets of the . . . Tribe . . . among the . . . members . . ." (J.A. 120). "The assets consist principally of the tribal land which comprises nearly 4,000 acres . . ." (J.A. 121). The committee reports, like the Act itself, make no mention of the 1763 Treaty claim sought to be preserved by the Tribe. The reports do show that Congress was basing its action on the Tribe's consent as expressed in its meetings of January 3 and March 28, 1959:

> The Catawba General Council at a regular meeting on January 3, 1959, asked that Federal restrictions be removed from their lands and that deeds thereto be issued. On March 28, 1959, the general council met in special session and endorsed the terms of this bill, as introduced, by a vote of 40 to 17.

H. R. Rep. No. 910, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2672 (J.A. 121).[13]

Both the House and Senate Reports portray the subject matter of the 1959 Act exclusively in terms of duties undertaken and assets acquired pursuant to the 1943 Memorandum of Understanding:

> Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the Federal Government.
>
> In accordance with the memorandum of understanding the State bought 3,434.3 acres of land for the Catawbas and by warranty deed dated October 5, 1945, the State conveyed the land to the United States in trust for the Tribe. *It is this land and the accumulated assets from operating it that would be conveyed under the provisions of the bill.*

H.R. Rep. No. 910, *supra* at 2673 (emphasis added) (J.A. 123-124).

[13]The efforts of the BIA and Congress to ensure tribal agreement to the division of assets were in accord with the newly revised congressional policy regarding termination of Indian tribes. In 1958, Congress and the Eisenhower Administration rejected coercive termination in favor of a policy that permitted termination based only on informed tribal consent. See F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.), discussed *infra* at 35.



The Catawba Division of Assets Act was signed into law on September 21, 1959. Following distribution by the Secretary of the Interior of only the assets acquired in 1943, the Secretary formally notified South Carolina Governor Hollings and Catawba Chief Sanders that the Department had carried out the mandate of the 1959 Act: the notice spoke exclusively in terms of withdrawing from the 1943 Memorandum of Understanding (J.A. 141).

Thereafter, the Catawba Tribe continued to reside on the small 630-acre state reservation. In 1971, the South Carolina Legislature enacted legislation exempting reservation mobile homes from state taxation and in 1975, the South Carolina Attorney General issued a formal opinion that the State continued to hold the 630-acre "old reservation" in trust for the Tribe. Op. Atty. Gen. S.C. No. 3988, March 6, 1975 (R. Vol. VI, Ex. 15).

## SUMMARY OF ARGUMENT

In 1840, the State of South Carolina, in the last of a series of illegal land transactions spanning more than 30 years, convinced the Catawba Tribe to "sell" its 144,000-acre 1763 Treaty Reservation. The State promised to purchase for the Tribe a new reservation elsewhere, but did not, acquiring instead a 630-acre farm that had been part of the 1763 Treaty Reservation. During the century that followed, successive generations of tribal leaders attempted to regain the land, and successive generations of state and federal officials turned their backs, each telling the Tribe that responsibility rested with the other.

In the 1930's, the State and the Department of the Interior began negotiations toward reaching a cooperative agreement for the purpose of rehabilitating the Catawba Tribe. At that time, the State attempted to secure an extinguishment of the 1840 tribal claim as a condition to participating in the rehabilitation program, but the Tribe and the Department refused and the three-party cooperative agreement was executed in 1943. Under its terms, the Secretary took into trust 3,434 acres, located within the 1763 Treaty boundaries, and agreed to provide limited services to assist the State in the relief effort.

Fifteen years later, with the relief program failing due to lack of federal assistance and tribal dissatisfaction high, the BIA and the local Congressman proposed to the Tribe that the 3,434 acres be distributed among tribal members. Tribal leaders initially refused, saying that the 1840 dispossession claim against the State would have to be resolved first. But the BIA assured them that the division of assets plan would not affect the claim. On January 3, 1959, a majority of the Tribe, which at no time during this period was represented by counsel, consented to the division plan and adopted a resolution, drafted by the BIA, that specifically conditioned tribal consent on leaving the "status of any claim" against the State unaffected. The Congressman then asked the BIA to draft a bill that carried out the resolution. The BIA complied and the Congressman then returned to the Tribe, read the bill line-by-line, and assured them it carried out the intent of their resolution. Based on these assurances, the Tribe approved introduction of the bill. Throughout the entire legislative process, Congress professed to be acting in reliance on and consistently with tribal consent.

This understanding between the Tribe, the Congressman, and the BIA is at the heart of this case. Tribal consent to the legislation was required by congressional and administrative policy. Therefore, absent a clear expression of Congressional intent to override, the Act must be read consistently with the assurances and conditions upon which that consent was obtained.

Petitioners rely on the failure of the 1959 Catawba Division of Assets Act to mention the tribal claim and a section of the Act containing language designed only to end active federal supervision. In complete disregard of the legislative history, petitioners would have the Court focus only on isolated statutory language and rule that Congress, without mention, breached the understanding with the Tribe and removed all federal protections from the 1763 Treaty lands that had admittedly (for summary judgment purposes) applied until 1959.

But Congress does not deal in so cavalier a fashion with important Indian treaty rights. In view of the strong



congressional policy against application of state statutes of limitations to Indian treaty lands, *County of Oneida v. Oneida Indian Nation,* 105 S.Ct. 1245, 1255 (1985), if Congress had intended to apply a limitations period, it would have provided that the claim would be deemed to have accrued on the Act's effective date as it did in 1966 when it enacted 28 U.S.C. § 2415. At the very least, some notice would have been provided to the Tribe that the "status" of the claim would, after all, be affected; that the earlier assurances were no longer in effect; and that the Tribe would have to file its claim within a period of years or lose it forever.

The legislative history and surrounding circumstances of the 1959 Act show clearly that Congress intended only to withdraw from the 1943 cooperative agreement and distribute only the 3,434 acres acquired pursuant to its terms. To that end, the 1959 Act removed federal restrictions only from the 3,434 acres, and the Secretary in fact distributed only the 3,434 acres. The relationship undertaken by the federal government in 1943 was not a general assumption of guardianship supervision; it was demonstrably limited to relief and rehabilitation of the Tribe and found its source exclusively in a limited 1940 congressional appropriation for that purpose. The federal protections at issue here are unrelated to and pre-date the federal relief project by more than 100 years, finding their source in treaty, the Constitution and federal statutory and common law.

In similar circumstances, this Court held that treaty rights not otherwise clearly included within the scope of a termination act would not be abrogated by the language relied on by petitioners here. *Menominee Tribe v. United States,* 391 U.S. 404 (1968). Such language, the Court held, was limited to the withdrawal of federal supervision. Because that language, contained in this case in 25 U.S.C. § 935, does not purport to identify the property from which supervision is withdrawn, its blanket application to tribal property would result in the indirect abrogation of rights not mentioned in the act and intended by Congress to be left outside the scope of the Act's coverage. The Court

thus looked to the "overall legislative plan" and found no clear intent to abrogate or modify treaty rights. The mere lifting of federal supervision was not sufficient to extinguish treaty rights not otherwise mentioned.

The *Menominee* analysis is fully applicable here. What the Catawba Tribe bargained for and received from the Crown in 1763 was not a tract of land—they already possessed the land. Rather, what the Tribe received in exchange for its vast aboriginal territory was the promise of sovereign protection. The United States assumed the Crown's obligations and thus the removal of federal protection from and application of state law to the 1763 Treaty lands would extinguish the fundamental incident of Catawba Treaty title—federal protection. That, in turn, would lead directly to extinguishment of the possessory interest, thereby defeating the very purpose of the Treaty.

Construction of the 1959 Act in accord with the understanding between the Tribe and the federal government to leave the status of the claim unaffected means only that the Tribe will have its long-awaited day in court. The end result of the 16-year federal effort to rehabilitate the Catawba Tribe should not be extinguishment of the historic claim that the Tribe persistently sought to protect, both when it agreed to accept federal relief and when it agreed to its discontinuance.

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## ARGUMENT

### I. THE 1959 ACT HONORED THE BIA'S AGREEMENT WITH THE TRIBE AND DID NOT EXTINGUISH OR LIMIT THE TRIBE'S 1763 TREATY CLAIM.

For purposes of summary judgment, petitioners' motion necessarily assumed that the 1840 state "treaty" was void under federal law and that the Tribe retained a right to possession of its 1763 Treaty lands until 1959. Petitioners' motion also assumed that the federally-protected status of the 144,000-acre Treaty tract was not validly disturbed until 1959. Thus, whether it is claimed that the 1959 Act applied state statutes of limitations or that the Act terminated any and all trust relationships between the Tribe and the United States, the underlying issue is



the same: did the 1959 Act extinguish *sub silentio* the federally-protected status of the 1763 Treaty lands in addition to the 3,434 acres acquired in 1943. These questions should be resolved in light of the fundamental principles recently affirmed in *County of Oneida v. Oneida Indian Nation,* 105 S.Ct. 1245 (1985) (*Oneida II*): time-related state law defenses will not be applied to determine rights in tribal lands and Congressional intent to extinguish Indian title must be plain and unambiguous.

#### A. The 1959 Act Removed Federal Restrictions Only From The 3,434 Acres Acquired In 1943—Congress Took No Action With Respect To The 1763 Treaty Claim.

The 1959 Division of Assets Act deals with only two classes of assets, *i.e.,* "the tribe's assets that are held in trust by the United States," 25 U.S.C. § 932, and those "assets that are held by the State in trust for the Tribe." 25 U.S.C. § 933(a). In 1959, although the Tribe's 1763 Treaty lands were still subject to federal protection, the technical fee title to the Treaty lands was not actually held by either the federal government or the State of South Carolina.[14] Hence, the 1959 Act directed or permitted distribution of tribal assets that did not include the 1763 Treaty claim. To enable the distribution, § 4 of the Act removes federal restrictions from only the lands "disposed of" under the provisions of § 3 and provides for the issuance of "unrestricted title" to only the "property conveyed." 25 U.S.C. §§ 933, 934. Therefore, the Act by its terms removed federal restrictions from only the 1943 Reservation.

This legislative scheme is confirmed by the committee reports on the 1959 Act, as well as the actions taken by Interior to implement it. The reports demonstrate conclu-

[14]While fee title, or the pre-emptive right to purchase from the Indians, became vested in the State of South Carolina upon this Nation's independence, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667, 670 (1974) (*Oneida I*); *see* Clinton and Hotopp, *supra,* 31 Me. L. Rev. at 36, South Carolina in 1838 conveyed its pre-emptive rights in the 1763 Treaty Reservation to the non-Indian lessees who occupied the Catawba Reservation at that time. Act of Dec. 19, 1838, S.C. Code of Laws, § 27-15-30 (1976), VI Stat. 602; *see* Op. Atty. Gen. S.C., Jan. 27, 1908, 20-21 (R. Vol. VI, Ex. 10).

sively that the Tribe, the Interior Department and Congress were concerned only with the reservation acquired in 1943, and to a lesser degree the 630 acres acquired in 1842:

> The assets consist principally of the tribal land which comprises nearly 4,000 acres, including 630 held in trust by the State of South Carolina.

H.R. Rep. No. 910, *supra* at 2672 (J.A. 121).

> In accordance with the memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and [in] . . . 1945 . . . conveyed the land to the United States in trust for the Tribe. *It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.*

*Id.* at 2673 (emphasis added) (J.A. 124).

The Report also states that the 3,388.8 acres held in trust by the United States and the 630-acre state reservation "comprise the tribe's total real property." *Id.* at 2674 (J.A. 124).

Following passage of the 1959 Act, the Department of the Interior acted consistently with the condition upon which tribal consent had been obtained and distributed only the federally-held trust lands acquired in 1943, Letter of March 29, 1966, Commissioner of Indian Affairs to Dir., S.C. Archives (R. Vol. III, Ex. 37). The Department took no action to quiet title to the Treaty lands in the Tribe or to otherwise distribute or affect the Tribe's 1763 Treaty claim, confirming that the Department did not interpret the 1959 Act to include the claim among the tribal assets subject to the Act.[15]

Petitioners, however, find Congressional intent to extinguish federal protection of the additional 140,000 acres of the 1763 Treaty tract in the language of § 5, relying on that section's general application of state law and termination of the Catawbas' limited eligibility for federal In-

[15]The statutory interpretation of the agency to which the administration of the statute is charged is entitled to deference, Udall v. Tallman, 380 U.S. 1, 16 (1965), particularly where the agency participated in drafting the statute and directly made known its views to Congress, as Interior did here. Zuber v. Allen, 396 U.S. 168, 192 (1969).



dian services. This Court has held that language very similar to § 5 of the Catawba Act is limited by its terms to the "termination of Federal *supervision* over the property and members of the Tribe." *Menominee Tribe v. United States,* 391 U.S. 404, 412 (1968) (emphasis in original).[16] Section 5 by its terms does not remove federal restrictions from tribal property, nor does it define the property which will no longer be subject to federal supervision upon the lifting of federal restrictions. Therefore, the applicability of § 5 with respect to restricted tribal property must be determined with reference to the other sections that do in fact identify the property that is the subject of the Act, §§ 2, 3, and which accomplish the actual removal of federal restrictions, § 4.

The all-encompassing application of § 5 advocated by petitioners would result in the extinguishment of rights intended to be left outside the Act's scope. That is precisely the result which the Court in *Menominee* refused to reach: treaty-secured rights to tribal property that is not clearly included with a termination act's coverage will not be backhandedly affected by the general lifting of federal supervision. Moreover, this Court has repeatedly held that congressional intent to impair Indian rights "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett,* 412 U.S. 481, 505 (1973); *Bryan v. Itasca County,* 426 U.S. 373, 392-93 (1976).

Congress simply did not deal with the 144,000-acre Treaty claim in any manner in 1959. As the parties to the

[16]In *Menominee,* the Court considered whether a provision in the Menominee Termination Act, 25 U.S.C. §§ 891-902, that was similar to § 5 of the Catawba Division of Assets Act, had the effect of subjecting that Tribe's Treaty right to hunt and fish to the laws of Wisconsin. The Menominee Act made no mention of either preserving or extinguishing the right, but did contain the provision that all federal Indian statutes would no longer be applicable and "the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens. . . ." 25 U.S.C. § 899. The Court examined the "overall legislative plan" and found that § 899 was limited to withdrawal of federal supervision: Congress had not intended to backhandedly extinguish the Treaty right through the general lifting of federal supervision.

Memorandum of Understanding had done in 1943, Congress left the Treaty claim entirely outside the scope of the Act. Petitioners' argument that Congress, by ending the Tribe's limited eligibility for federal services and the BIA's supervisory duties for the 3,434-acre 1943 Reservation, also *sub silentio* extinguished or limited the 1763 Treaty claim in violation of the express understanding reached between the Tribe and the federal government is untenable.

### B. The Legislative History And Circumstances Surrounding The 1959 Act Demonstrate That Congress Did Not Intend To Affect In Any Manner The Tribe's Treaty Claim.

The Court of Appeals correctly held that the legislative history of the 1959 Act demonstrates congressional intent not to affect the Treaty claim. Rather, the Act and its history show an intent "only to end federal supervision and authority arising out of the 1943 Memorandum of Understanding." (Pet. App. 15a-16a). While the Act itself does not mention the Tribe's 1763 Treaty land, its legislative history reveals that Congress intentionally left the Tribe's Treaty claim unaffected.[17]

Petitioners and the United States, however, would dismiss entirely the relevant legislative history that shows so clearly what Congress intended to accomplish in 1959. They argue that the 1959 Act unequivocally makes state law applicable to the Tribe's 1763 Treaty claim and would have the Court look no further than the words of § 5 for its result. The first major difficulty with this approach to construction of the 1959 Act is that it ignores the limited construction already given very similar language by this Court in *Menominee Tribe, supra.* An equally serious difficulty lies in the complete failure to account for the understanding reached between the United States and the Tribe, *i.e.*, tribal consent to the division of federal assets

[17]This Court has stated that whenever it is asserted that an Act of Congress affected the status of an Indian reservation, a court must "in all cases" consider "the face of the Act, the surrounding circumstances, and the legislative history" to determine the Congressional intent. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977); Mattz v. Arnett, 412 U.S. 481, 505 (1973); DeCoteau v. District County Court, 420 U.S. 425 (1975) *See Solem v. Bartlett,* 104 S.Ct. 1161 (1984).



was expressly conditioned upon nothing in the act affecting the "status of any claim" arising out of the 1840 dispossession. *Hearings,* Insert 6. Moreover, petitioners' approach fails to account for Congress' exclusive focus in 1959 on the 1943 Memorandum of Understanding.[18]

The Court should not construe the provisions of § 5 in isolation from the remainder of the Act and its history, but should consider § 5 with Congress' overall purpose in mind:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute . . . .
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole," this Court has followed that purpose, rather than the literal words.

[18]In its analysis of whether the 1959 Act ratified the 1840 "treaty," the United States concedes that (1) the Act should be construed in light of the January 3, 1959 tribal resolution; (2) the "Catawba Act was drafted to carry out the intent of the resolution," U.S. Br. at 8, n. 7; and (3) "Congress's focus in this case [was] on the 1943 Memorandum of Understanding." *Id.* at 15. But in its analysis of the applicability of state law to the 1763 Treaty claim, the United States does an about-face and accords absolutely no significance to the tribal resolution, or other legislative history, arguing instead that only the language of § 5 should be considered. *Id.* However, all sections of the Act must be construed in light of the conditions and assurances upon which tribal consent was obtained.

*United States v. American Trucking Ass'n.*, 310 U.S. 534, 542-3 (1940) (footnotes omitted); *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395 (1975). Petitioners' and the United States' reliance on only the language of § 5 in isolation from the rest of the Act and its history is misplaced, for even if the provisions of § 5 were clear, which they are not, their application here would lead to a result that is "plainly at variance" with the overall purpose of the legislation. *Id.*

**1. Congress Intended The 1959 Act To Implement The Division Of Assets Plan Agreed To By The Tribe, Their Congressman And The BIA: Congress Understood That Plan To Be Embodied In The January 3, 1959 Tribal Resolution.**

In 1958, the BIA's special program officer met with tribal leaders and assured them that the Tribe's 1763 Treaty claim would be unaffected by the proposed legislation to divide the federal assets (R. Vol. VI, Ex. 53). The tribal resolution endorsing the division of assets legislation was drafted by the BIA (the Tribe was not represented by counsel), and specifically conditioned tribal consent on the Tribe's understanding "that nothing in this legislation shall affect the status of any claim against the State . . . by the . . . Tribe." *Hearings*, Insert 6 (J.A. 103). Thereafter, Congressman Hemphill requested the BIA to draft a bill to accomplish the desires of the Tribe as set forth in the tribal resolution (J.A. 50). The BIA complied. *Hearings* at 84.

The Congressman then returned to the Tribe on March 28, 1959, read line-by-line the BIA's draft bill containing § 5 as enacted, *Hearings* at 9, and assured the Tribe that the bill had been drafted to carry out the intent of the January 3, 1959 resolution (J.A. 111). Referring to the bill as a "contract that was drawn up by the [BIA]" (J.A. 106, 107), the Tribe then approved the bill and the Congressman introduced it, emphasizing to his colleagues that the Tribe had enacted a resolution supporting it. 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 117).

At the congressional subcommittee hearing, the Congressman emphasized "the deplorable situation of the Indians" and the Tribe's dissatisfaction with the 1943 Memorandum of Understanding. *Hearings* at 4-5. The Congressman testified that his bill was "to do something about" the problems resulting from the "worthless" 1943 agreement that resulted in the Indians' inability to "borrow any money on community property [or] . . . develop the reservation." *Hearings* at 7. The Congressman told the subcommittee that he had refused to introduce this bill until the Tribe requested it and then introduced the tribal resolution into the record to establish tribal agreement. *Hearings* at 8, 13. He emphasized throughout his testimony that the Tribe had consented to the bill. Summarizing the situation, the Congressman testified:

> We are frankly, faced with this alternative: *Do what the Indians want*, or leave the situation in its present status which bars many who want to own their lands, their homes, from expecting progress in the future.

*Hearings* at 11 (emphasis added). The congressional committee reports on H.R. 6128 show that Congress relied specifically on the January 3 and March 28 endorsements by the Tribe. H.R. Rep. No. 910, *supra* at 2672, 2675 (J.A. 121, 126).

This legislative history demonstrates that Congress honored the agreement with the Tribe and left the tribal claim unaffected. Neither the Act itself nor the Committee Reports contain even a suggestion that Congress intended to alter the status of the Tribe's understanding with the BIA in any way.[19] The 1959 hearing record contains the January 3 tribal resolution, as well as an October

[19] Petitioners urge the Court to disregard tribal consent as expressed in the January 3, 1959 resolution, arguing that a more relevant indicator of what the Tribe agreed to is the post-Act "vote" of the Tribe (Pet. Br. at 45, n. 133). Interior's post-Act explanation, however, contained nothing to indicate that the prior assurances were no longer in effect—§ 5 had not been amended from the time that BIA and the Congressman read it line-by-line and assured the Tribe that the Act carried out the resolution's intent. Moreover, as Assistant Commissioner Lee testified, *Hearings* at 86-87, the purpose of the amendment to § 1 requiring a plebiscite was merely confirmatory of the earlier understanding, *i.e.*, "to dispell all doubt" that the earlier meetings (January 3 and March 28) were "indicative that the large majority . . . actually want this type of legislation." Lee told the subcommittee that the BIA was "reasonably sure" they were. *Id.*

29, 1958 letter from Chief Blue claiming that the state "owes us a great deal" for the "land under lease,"—described as the area presently claimed by the Tribe. *Hearings,* unnumbered insert. Congress was thus certainly aware that the Catawba Tribe possessed a claim that it desired to protect, that the Tribe had expressly conditioned its consent to division of the 3,434 acres on leaving the status of the claim unaffected, and that the bill had been drafted to conform to tribal desires. At every stage of the legislative process, from agency drafting to final enactment, it was emphasized that the Tribe had consented to the provisions of the bill.

**2. Because Tribal Consent Was Required By Congressional And Administrative Policy, The 1959 Act Must Be Construed Consistently With The Conditions Upon Which Tribal Consent Was Obtained.**

The congressional and departmental concern for tribal consent conformed to an important recent revision in federal termination policy that occurred in 1958. In that year, Congress and the Eisenhower Administration rejected the coercive termination policy that underlay the first nine termination acts enacted in 1954 and 1956. F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.). The revised policy placed special emphasis on both the Indians' understanding and consenting to termination. On September 18, 1958, Secretary of the Interior Fred Seaton publicly renounced coercive termination. Seaton stated that no Indian tribe or group should be terminated:

> unless such tribe or group has clearly demonstrated-first, that it understands the plan under which such a program would go forward, and second, that the tribe or group affected concurs in and supports the plan proposed . . .

*Id.,* Broadcast address over Radio Station KCLS, Flagstaff, Ariz., *quoted in* 105 Cong. Rec. 3105 (1959). Thus, unlike earlier termination acts, Congress expressly conditioned implementation of post-1958 acts on the consent of the affected Indians or tribes. *See* 72 Stat. 619, § 2(b) (California Rancheria, 1958); 25 U.S.C. § 931 (Catawba, 1959); 25 U.S.C. § 971 (Ponca, 1962).



If Congress had intended to repudiate the conditions and assurances upon which the Tribe's consent was obtained, then it certainly would have notified the Tribe to that effect. Petitioners' interpretation of the legislative history, in particular their reliance on general statements and explanations made to the Tribe regarding ending federal responsibility and the inapplicability of federal Indian laws, *see, e.g.,* Pet. Br. at 17, would require the Tribe —which at no time during the legislative process was represented by counsel (other than the BIA)—to simply discover at some later date that the prior guarantees were no longer in effect.

But Congress certainly could not have expected the Catawba Tribe in 1959 to understand the intricacies of the applicability of time-related state law defenses or whether its claim was in fact founded in state or federal law. Chief Samuel Blue, who led his Tribe for most of the 40-year period preceding the 1959 Act, *see* 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 116), had never attended school and was unable to read or write. *Survey of Condition of the Indians, etc.,* S. Doc. No. 92, *supra* at 7552. The Tribe simply understood that the State had taken its 1763 Treaty lands and had not honored its agreement to buy new tribal lands—leaving the Tribe destitute on a barren tract comprising less than one percent of its former holdings. As best it could, the Tribe sought to ensure that the Division of Assets Act would not "affect the *status* of *any* claim against the State of South Carolina"—whatever that claim might be—and the United States agreed.[20] Indeed, the Tribe viewed the bill presented by Congressman Hemphill as a "contract" (J.A. 106). If Congress had intended to change the terms of that agreement and apply state stat-

[20]Petitioners argue that the Tribe sought only to preserve a "claim against the State," as distinguished from the other public and private defendants (Pet. Br. at 46, n. 135). However, the history of events leading to the 1943 Memorandum of Understanding demonstrate that this was simply the common manner of referring to the claim arising out of the 1840 dispossession. *See, e.g.,* R. Vol. VI, Ex. 47. The Tribe, South Carolina, and the United States *all* knew that the 1763 Treaty claim had been persistently pursued by successive generations of tribal leaders and that the claim had not been addressed and resolved.

utes of limitations—thereby drastically affecting the "stat-[illegible]" of the claim—it must be presumed that Congress would [illegible]ve notified the Tribe that its claim would have to be [illegible]led within a certain period of years or be forever lost.[21]

Absent such clear expression of contrary intent by Congress, the intent of the Tribe, the Interior Department and Congressman Hemphill to leave the 1763 Treaty claim unaffected is controlling, for Congress clearly intended to enact legislation that would implement the division of assets plan agreed to by the Tribe. Moreover, Congress knew that tribal consent was embodied in the January 3, 1959 resolution. *Hearings* at 8, insert 6. *See Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 656-8 (1976) ("Nothing in the legislative history shows any congressional purpose not to follow the Secretary's proposal [that honors the Tribe's request] . . .").

Petitioners argue that because Congress explicitly preserved certain Indian rights or claims in other termination acts, Pet. Br. at 43-44 and n. 127, its failure to do so here shows congressional intent to subject the claim to state law. However, petitioners' assertion is squarely inconsistent with the rule established by the Court in *Menominee Tribe v. United States,* 391 U.S. 404 (1968), where the Court held that notwithstanding the Menominee Termination Act's failure to preserve or even mention treaty hunting and fishing rights, that Act's explicit provision that "the laws of the several States shall apply to the Tribe and its members in the same manner as they apply to other citizens . . .," 25 U.S.C. § 899, would not operate to extinguish the federally-protected right to hunt and fish free of state law. Congress' failure to expressly preserve the tribal claim in this case is fully consistent with its express and limited plan to distribute the 3,434 acres acquired

[21]In *Oneida II,* this Court noted the strong congressional policy against the application of state statutes of limitations to Indian land claims. If Congress had intended to change this policy with respect to the Catawba's Treaty claim, it would have surely given notice and provided that the claim would be deemed to have accrued on the effective date of the 1959 Act, as it did in 1966 when it enacted 28 U.S.C. § 2415.



pursuant to the 1943 Memorandum of Understanding.[22] Consistent with the guarantees made to the Tribe and the conditions upon which tribal consent to the legislation had been obtained, Congress simply was not addressing the much larger 144,000-acre 1763 Treaty claim.

### C. Federal Protection Of The 1763 Treaty Lands Was Not Extinguished By The 1959 Act.

#### 1. The Federal Protections At Issue Here Are Unrelated To The Duties Undertaken By The United States In 1943 And Hence Were Unaffected By The 1959 Act.

The legislative history of the 1959 Act demonstrates that the federal duties and responsibilities that were ended in 1959 were founded in a 1940 Congressional appropriation of $7,500 to enable the BIA "to cooperate with the State of South Carolina in the rehabilitation of the Catawba Indians". *Hearings,* Insert 5 at 3 & 4 *quoting* Oct. 31, 1940 memorandum from Commissioner of Indian Affairs to Secretary of Interior.[23] In fact, Congress had twice refused, in 1937 and 1939, to enact legislation that would have extended general federal supervision to the Catawbas (R. Vol. VI, Exs. 32, 39); *see* note 9, *supra.* Associate Commissioner Lee testified at the hearings on the 1959 Act that the BIA "gave no service at all until 1943. We had no relationship with these Indians whatsoever of any kind. It was only in 1943 that we entered into this cooperative agreement with the State of South Carolina to give some supplementary services to this group." *Hearings* at 88.

[22]When Congress intended to preserve a tribal property right, but subject that right to the operation of state law after a period of years, it specifically so provided. Section 14 of the Klamath Termination Act, 25 U.S.C. § 564m, provides that the Tribe's water rights shall not be abrogated by the Act and that Oregon law "with respect to abandonment and nonuse shall not apply to the tribe and its members until fifteen years after the date of the proclamation . . . ."

[23]The Oct. 31, 1940 memorandum further stated: "[t]here is no question of assuming federal guardianship jurisdiction, but merely of carrying out the apparent desire of Congress to give a small degree of aid to the state coupled with expert advice." *Hearings,* Insert 5 at 4.

The Committee Reports on the 1959 Act speak exclusively of a relationship and duties that "date back only to the 1940's" and which were undertaken for the limited purpose of "improv[ing] the economic conditions of the members." H.R. Rep. 910, *supra* at 2672 (J.A. 120-121). The departmental report likewise identifies the duties and assets that are the subject of the Act as those acquired pursuant to the Memorandum of Understanding. The limited nature and scope of the particular trust relationship that is the object of the 1959 Act is confirmed by the following departmental disclaimer:

> The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the federal government.

*Id.* at 2673 (J.A. 123). In fact, it is noteworthy that the other stated objective of the Memorandum, in addition to rehabilitation of the Tribe, was that the "Catawba Indians be accorded equal treatment with other citizens, without discrimination." (J.A. 45). In 1962, the "Notice" that the Interior Department had complied with the 1959 Act, provided by the Secretary to the Tribe and the South Carolina Governor, spoke exclusively in terms of withdrawing from the 1943 Memorandum of Understanding (J.A. 141).

The limited scope of duties undertaken by the United States in 1943 is further illustrated by the fact that the Department of the Interior deliberately left the Tribe's land claim outside the scope of the duties undertaken in 1943, refusing to agree to a clause in the Memorandum of Understanding that would have purported to extinguish the claim. Mem. Sol. Int., Jan. 13, 1942, I *Interior Opinions* at 1081-82 (J.A. 43-44). Instead, the Department maintained the *status quo* and advised the State that "the State itself could most properly take the initiative in negotiating with the Catawba Business Committee on the matter of the Tribal claim." Aug. 28, 1941, Assistant Commissioner of Indian Affairs to South Carolina State Auditor (R. Vol. VI. Ex. 47).[24]



The legislative history and surrounding circumstances demonstrate that the federal duties and responsibilities that were extinguished in 1959 were only those undertaken in 1943 to provide relief for the Catawbas. In contrast, the federal protections at issue here are unrelated to and pre-date the 1940 appropriations act by more than 100 years. The federal protections at issue here are founded in the 1760 and 1763 Treaties with the Crown, the Constitution, federal common law, and the Indian Nonintercourse Act, 25 U.S.C. § 177.

Lower courts that have considered the continuing applicability of Nonintercourse Act protections have concluded that, in order to maintain such a claim, a tribe must demonstrate that "the trust relationship between the United States and the tribe, *which is established by coverage of the Act,* has never been terminated." *Narragansett Tribe v. So. R.I. Land Devel.,* 418 F.Supp. 798, 803 (D.R.I. 1976) (emphasis added). In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 379 (1st Cir. 1975), the First Circuit Court of Appeals held that

[24]The Interior Department's interpretation of the scope of authority granted by Congress is entitled to weight. Udall v. Tallman, *supra.* In his August 28 letter, the Assistant Commissioner of Indian Affairs explained to the State Auditor the limited nature of the "responsibilities this Office can assume":

> As you will recall, after the State Legislature made its original offer a few years ago to contribute $100,000 toward a rehabilitation program for the Catawba Indians, a bill was introduced into Congress to bring the Catawbas under Federal supervision. This bill, however, was disapproved by the Bureau of the Budget, and in lieu thereof Congress authorized a small appropriation of $7,500 to enable us to cooperate with the State and with other Federal agencies to work out a program. This appropriation is limited to relief and to administrative expenses in connection with the cooperative project.

*See* Mem. Sol. Int., Jan. 13, 1942 (J.A. 41), discussed *supra* at n. 10, where the Solicitor held that the source of the Department's authority to enter into the 1943 Memorandum was the FY'41 appropriations act, but that the authority was limited to the purposes of the appropriation, *i.e.,* "relief" of the Catawbas.

federal protection under the Nonintercourse Act may exist even in the absence of any formal or recognized relationship between a Tribe and the United States:

> the 'trust relationship' we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities . . .

In this case, the federal protection pertaining to the 1840 land transaction was intentionally left outside the scope of limited duties undertaken in 1943. In 1959, although Congress certainly could have terminated federal protection of the 1763 Treaty claim, it did not do so. Instead, in furtherance of the current policy of requiring informed tribal consent, it enacted limited legislation, tribal support of which had been expressly conditioned upon leaving the "status" of the Tribe's Treaty claims unaffected. Because it cannot be argued that extinguishment of federal protection under the Treaties, Constitution, and federal statutory and common law would not affect the "status" of the claim, petitioner's broad interpretation of the effects of § 5 of the 1959 Act is precluded.

The net effect of the 1959 Act was simply to return the Catawba Tribe to its pre-1943 status—a "state" Tribe on a state reservation, ineligible for federal Indian services and subject to state law for most purposes; but not with regard to its claim to its federally-protected Treaty lands.

**2. Even If The 1959 Act Removed Statutory Rights, It Did Not Remove Federal Protection Under Treaties And The Constitution.**

Petitioners argue that the only source of protection for the 1763 Treaty lands is the Nonintercourse Act, claiming that the Tribe acquired pursuant to its treaties "no right to own property or to enforce claims under different laws than non-Indians." Petitioners argue that *Menominee*



is therefore inapplicable here because no treaty right is involved in this case. Pet. Br. at 43 and n. 125.

However, the issue here, as it was in *Menominee,* is whether § 5's language subjected federally-protected treaty rights to the operation of state law. Here, as in *Menominee,* the property right finds its source in a treaty with the national sovereign. The Catawba Tribe, like the Menominees, bargained for and received the protection of the sovereign for its reservation land base. While the Menominee treaty did not specifically include the right to hunt and fish, the Court applied the canon of construction requiring ambiguous expressions to be construed as the Indians would have understood them, and held that the Treaty language confirming their reservation "for a home, to be held as Indian lands are held" included the right to hunt and fish. *Menominee* at 405-406. That canon is fully applicable here.

Application of state law to the Catawba Treaty land would as surely extinguish treaty rights as would the application of state law to the Menominees' treaty rights. What the British offered and what the Catawbas thought they had received in exchange for cession of most of their ancestral lands, was sovereign protection of the Tribe's right to unmolested occupancy of its retained lands. The minutes of the 1763 Treaty negotiations ("our King and Father holds out his arms to . . . protect you . . . and you may be assured of his confirming to you all your just claims to your lands")[25]; the terms of the Treaty itself (Crown's agents "promise . . . that the Catawbas shall not in any respect be molested . . .")[26]; and the subsequent protective actions of the crown (South Carolina cannot lease Catawba lands "without a Manifest violation of His Majesty's Orders . . .")[27]; demonstrate beyond doubt that one of the most important guarantees for which the Catawba Tribe bargained in 1760 and 1763 was the promise of sov-

[25]Colonial Records of North Carolina, Vol. 2, 198 (1890) (J.A. 30).

[26]*Id.* at 201-202 (J.A. 35).

[27]Great Britain, Public Records, Colonial Office, Class 5, Vol. 74, pp. 85-87 (R. Vol. VI. Ex. 7); see n. 3, *supra.*

ereign protection.[28] The United States succeeded to the Crown's protective obligations under the 1763 Treaty.[29] The application of state law would thus result in abrogation of an express treaty right, *i.e.*, the complete extinguishment of sovereign protection of the Catawbas' lands. This in turn would have the direct result of confirming non-Indians in the possession of tribal lands—the very evil from which the sovereign had promised to protect the Tribe in the first instance.

The guarantees of the 1760 and 1763 treaties, that the Catawbas would be quietly settled on their lands free from white incursion, provide an independent source of continuing federal protection for the 1763 Treaty lands that is separate and distinct from the Nonintercourse Act. *See Oneida I, supra* at 667. In addition, they provide an independent basis for invalidating state action inconsistent with the supreme law of the land. *Washington v. Fishing Vessel Assoc.*, 443 U.S. 658 (1979); *Menominee Tribe, supra; Missouri v. Holland*, 252 U.S. 416 (1920).

Furthermore, the restraint on alienation is a necessary incident of Indian title. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 576, 591, 603 (1823). The exclusive authority of the United States to extinguish Indian title is founded in the Constitution itself. U.S. Const., art. I, § 8, cl. 3. First under Great Britain, and later the United States, Indian tribes have always been disabled from alienating their lands absent the consent of the general government. This fundamental principle antedates the statutory restraints found in the Nonintercourse Act. Thus, the

[28]The Catawba Tribe did not acquire its lands in the 1760 and 1763 Treaties; it already had them. What the Tribe acquired was sovereign protection: it *reserved* the 15-mile-square tract and relinquished its claims to a vastly larger portion of its aboriginal territory. Thus, with regard to the Treaty lands, "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905). In return for its cession of lands, the Tribe received promises of protection by the Crown on those lands which it reserved.

[29]United States v. Title Ins. & Trust Co., 265 U.S. 472, 484 (1924); Mitchel v. United States, 35 U.S. (9. Pet.) 711, 745, 747-48 (1835).



Constitution also provides an independent basis for invalidating the 1840 state treaty and protecting the Tribe's Treaty lands. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68, 670 (1974) (fact that fee title to Indian lands in original 13 states lay in the states "did not alter the doctrine that federal *law, treaties* and *statutes* protected Indian occupancy") (emphasis added); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 604 (1823) (invalidating pre-Nonintercourse Act land grants by tribe without consent of general government);[30] *see* F. Cohen, *Handbook of Federal Indian Law* 270, n. 2 (1982 ed.).

Thus, the central question in this case, as in *Menominee*, is whether treaty property rights may lose their federally-protected status solely by operation of a general section intended only to lift active federal supervision. Thus, even if the language of § 5 is sufficient to lift federal statutory protections, § 5 may not operate to extinguish the protections found in the 1760 and 1763 Treaties and the Constitution. Use of the word "statutes" in § 5 of the 1959 Act "is potent evidence that no *treaty* was in mind." *Menominee, supra* at 412 (emphasis in original).

### D. State Law May Not Be Applied To Determine Rights In Undistributed Tribal Property.

The overall scheme of the Catawba Division of Assets Act, as well as every other act of Congress terminating federal supervision over tribal land, provides for the termination of federal protection and trust duties only for those tribal assets that are included within the scope of the act, *i.e.*, those assets from which federal restrictions are removed and which are distributed under the Act. We are aware of no instance in the history of federal Indian legislation, and petitioners have pointed to none, where Congress, in dealing with tribal trust property, has removed federal protections and applied state law without specifying the affected property and giving precise and careful instructions directing the Secretary of the In-

[30]See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345-46 (1941).

terior in the method and manner of division and distribution of the property. *See, e.g.*, 25 U.S.C. § 564d, e, & p.

This Court has long relied on the strong congressional policy against the application of state law to determine tribal rights in restricted property,[31] and has applied without exception the rule that state law defenses may not be invoked to overrule federal law and defeat a claim of *tribal* title.

Each of the cases upon which petitioners rely for the proposition that all federal protection was extinguished by the 1959 Act involved the question whether federal protection or trust duties continue toward former tribal property after the express removal of federal restrictions from that property and its actual distribution to individual tribal members.[32] Likewise, each of the cases cited for the proposition that state statutes of limitations apply to the 1840 taking claim after 1959 involve the application of state law to allotted individual Indian lands that were expressly the subject of the treaty or legislation at issue, *i.e.*, the lands at issue were the same lands from which federal restrictions had been removed.[33] Because these cases deal

[31]*See* County of Oneida v. Oneida Indian Nation, 105 S.Ct. 1245, 1255 and n. 13 (1985) (*Oneida II*); Board of County Commissioners v. United States, 308 U.S. 343, 350-51 (1939); United States v. Minnesota, 270 U.S. 181, 196 (1926); Ewert v. Bluejacket, 259 U.S. 129, 137-38 (1922).

[32]Affiliated Ute Citizens of Utah v. U.S., 406 U.S. 128 (1972), involved the issue of continuing federal supervision over individual Indian property (stock shares) that had been distributed pursuant to the Ute Termination Act, 25 U.S.C. § 677. The property at issue was not tribal, and federal restrictions had been removed. *Id.*, 406 U.S. at 150. Significantly, the *Affiliated Ute* Court observed, at 139, that § 677v "of course did not purport to terminate the trust status of the undivided assets", (*citing Menominee*). Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981), likewise involved the distributed property of an individual Indian. United States v. Heath, 509 F.2d 16 (9th Cir. 1974), involved no property; rather, it dealt with the post-termination status of an individual Indian for purposes of criminal prosecution.

[33]See Schrimpscher v. Stockton, 183 U.S. 290 (1902); Dickson v. Luck Land Co., 242 U.S. 371 (1917); Dillon v. Antler Land

(Continued on next page)



only with the allotted lands of individual Indians, they have no relevance to a determination of rights in undistributed tribal property.[34]

Congress neither removed federal restrictions from the 1763 Treaty lands nor provided for their distribution. They thus retain their status as federally-protected tribal lands to which state statutes of limitations do not apply.

(Continued from previous page)

Co., 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); Dennison v. Topeka Chambers Indus. Dev. Corp., 724 F.2d 869 (10th Cir. 1984). The discussion in Bryan v. Itasca County, 426 U.S. 373, 389-90 (1976), relied on by petitioners for the proposition that termination acts subject Indians to the full sweep of state law (Pet. Br. at 20), states no more than the fundamental proposition that a termination act subjects individual "tribal members" and their "distributed property" to state law. In this case, as in *Schrimpscher* and *Dillon*, both the Catawba Tribe and its members became subject to state law with respect to the "distributed property," i.e., the 1943 Reservation from which federal restrictions were removed. Likewise, the federal responsibility to hold title and provide services to those distributed lands was ended. But for the 140,000 acres of undistributed tribal Treaty lands that remained wholly outside the scope of the 1959 Act, federal restrictions continued unaffected.

[34]Lands that have been allotted to individuals are destined eventually to become unrestricted private property, and they take on some of the characteristics of state law prior to the final lifting of federal restrictions. Thus, the right of possession of a restricted allotment (absent an allegation of jurisdiction under 25 U.S.C. § 345), is a matter for state courts. Taylor v. Anderson, 234 U.S. 74 (1914). In 1834, Congress removed the lands of individual Indians from Nonintercourse Act coverage. Jones v. Meehan, 175 U.S. 1 at 12-13 (1899). The question of *tribal* occupancy, on the other hand, is exclusively federal in nature. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-670 (1974) (*Oneida I*): The court in *Oneida I* explained this important distinction:

> In Taylor [v. Anderson], the plaintiffs were individual Indians, not an Indian Tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands . . . . Individual patents had been issued with only the right to alienation being restricted for a period of time . . . Once patent issues, the incidents of ownership are, for the most part, matters of local property law. . . ." *Id.* at 676 (citations omitted).

### E. The Tribe's Treaty Claim May Not Be Extinguished Or Limited Absent A Plain And Unambiguous Statement Of Congressional Intent And Ambiguities Must Be Resolved In The Tribe's Favor.

#### 1. The 1959 Act Is Ambiguous: It Does Not Clearly Apply State Law To The Tribe; Rather, In Light Of The Legislative History And Surrounding Circumstances, It Applies State Law To Only Individual Tribal Members.

In addition to dismissing as irrelevant the Act's legislative history and surrounding circumstances, petitioners' reliance on the isolated wording of § 5 is inappropriate because that section, standing alone, is ambiguous. A careful reading of § 5 reveals that it is unclear whether, upon the Act's effective date, (1) state law shall thereafter apply to both the Tribe and its members or simply to the individual members of the Tribe, and (2) whether statutes of the United States that affect Indians because of their status as Indians were rendered inapplicable to both the Tribe and its members or only to the individual members of the Tribe. Because the right at issue here is a tribal right, and assuming *arguendo* that § 5 could apply to lands from which federal restrictions were not expressly removed, the distinction that Congress drew between Indians as individuals and Indian tribes is an important one.

This point can best be understood by reference to the last sentence in § 5, providing that "[n]othing in this subchapter, however, shall affect the status of *such persons* as citizens of the United States." (Emphasis added). This sentence plainly refers to individuals, its purpose being to preserve the citizenship status of individual Indians. *See* 8 U.S.C. § 1401(b). While this is a standard provision that was contained in each termination act, the other termination acts accomplish the same purpose using slightly different language—and that difference is significant here. Each of the other termination acts, with the exception of one, provides that the citizenship status of the "members of the tribe" shall be unaffected. *See* 25 U.S.C. §§ 564q(b); 703(b); 727; 757(b); 803(b); 823(b); 848(b); 899. In contrast, § 5 of the 1959 Act provides that the citizenship status of "such persons" shall be unaffected. The words "such persons" must necessarily have reference to individual Indians in an earlier sentence. The final clause of the previous sentence in § 5 provides that "the laws of the several states shall apply to *them* in the same manner as they apply to other persons or citizens within their jurisdiction."



The conclusion that "them" refers to individual Indians and that Congress thus applied state law only to individual Catawba Indians is strengthened by a comparison of the similar provisions of other termination acts. In each of the other termination acts that affected both tribes and individuals,[35] Congress explicitly provided that state law would thereafter apply to both the "tribe and its members." *See* 25 U.S.C. §§ 564q(a); 703(a); 726; 757(a); 803(a); 823(a); 848(a); 899. In contrast, the application of state law to "them" in the 1959 Catawba Act is identical to the state law provision in its immediate predecessor, the 1958 California Rancheria Act, 72 Stat. 619, § 10(b). There, § 10(b) in its entirety dealt only with the removal of federal supervision over individual Indians. *See* n. 35, *supra*.

Moreover, the clause in § 5 rendering inapplicable statutes that affect Indians because of their status as Indians is also identical to that contained in § 10(b) of the California Rancheria Act, which affected only individuals. In fact, in eight termination acts, Congress provided that such statutes would be inapplicable only "to the members of the tribe." 25 U.S.C. §§ 564q(a); 677v; 703(a); 757(a); 803(a); 823(a); 848(a); 899. In two termination acts, Congress provided that statutes that affect Indians because of their Indian status would be inapplicable both to the tribes and the individual members. 25 U.S.C. §§ 726, 980.

[35]Two termination acts were directed primarily at individual Indians, not Indian tribes. The Mixed-Blood Ute Termination Act, 25 U.S.C. § 677, terminated certain tribal members but left the status of the Ute Tribe and its full-blood members unaffected. The California Rancheria Act, 72 Stat. 619, likewise did not deal with tribal assets. *See* § 10(b) and S. Rep. No. 1874, 85th Cong., 2d Sess. 3 (1958) (Membership rolls not prepared because "groups are not well-defined," and "lands were for the most part acquired . . . by the United States for Indians in California, generally, rather than for a specific group . . ." and assets distributed according to plans developed or approved by "administratively selected users of the land.").

Thus, Congress plainly distinguished between tribes and individuals when it terminated federal supervision. Section 5 of the 1959 Catawba Act is patterned most closely after § 10(b) of the 1958 California Rancheria Act, which by its terms affected individuals only. In 1959, when Congress sought to broaden the scope of the provision to include the Catawba Tribe among those no longer entitled to special Indian services, it expressly so provided in the first clause, but it left the scope of coverage of the remaining clauses unchanged, using the exact wording from the California Rancheria Act.

In 1962, when Congress intended to further broaden the scope of the section and ensure that the Ponca Tribe, as well as its members, would be among those to whom Indian statutes would no longer be applicable and to whom state law would apply, it specifically inserted the words "or Indian Tribe" after the word "Indians." 25 U.S.C. § 980. *See Bryan v. Itasca County*, 426 U.S. 373, 386 (1976) ("we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments. *Moe v. Salish and Kootenai Tribes*, 425 U.S., at 472-475 . . .").

Finally, because the 1962 Ponca Act had rendered state law applicable to both the Tribe and its members, it was necessary in the next and final sentence of that Act to preserve the citizenship status of "any Indian," rather than "such persons," as had been done in the California and Catawba Acts.

Thus, petitioners' argument that § 5 is clear depends not only upon reading § 5 without reference to those sections of the act that define the lands from which restrictions are to be removed, *see* Section I.A., *supra*, but also depends upon reading § 5 as though the final sentence regarding citizenship status were contained elsewhere in the Act or did not exist at all.

The Court of Appeals was correct in considering the overall purpose of the Act as demonstrated by its legislative history and surrounding circumstances and refusing to impute to Congress an intent to apply state law to the *tribal* Treaty claim. The Court of Appeals noted that



Congress withdrew the Nonintercourse Act's protection of individual Indians' lands in 1834, *Jones v. Meehan*, 175 U.S. 1, 12-13 (1899), and correctly held that, in terms of the type of lands under its protection, the Nonintercourse Act was a statute that affected tribes rather than individual Indians (Pet. App. 20a-21a).

The conclusion that the Nonintercourse Act is not a statute that "affect[s] Indians because of their status as Indians"—as Congress used that phrase in the Catawba Act—is strengthened by the fact that in eight termination acts Congress made such statutes inapplicable to only "members of the tribe." 25 U.S.C. §§ 564q(a); 677v; 703(a); 757(a); 803(a); 823(a); 848(a); 899. This Court has held in *Menominee Tribe, supra*, that language similar to § 5's is limited to withdrawal of federal supervision. The type of federal supervision Congress had in mind, as demonstrated by the eight acts cited above, was eligibility for services, active guardianship supervision of individual Indians' affairs, and active management of tribal real property. The protections and restrictions of the Nonintercourse Act however, do not fall within the class of federal supervisory matters intended by Congress to be addressed by § 5. Congress addressed the policies and purposes of the Nonintercourse Act in other sections of the 1959 Act.

Thus, protection of the Indians' rights in their lands that were subject to the 1959 Act was accomplished by § 3 of the Act, providing for appraisal and equal distribution of assets held in trust. Protection of the governmental interest of the United States in maintaining exclusive control over tribal land transfers was accomplished by § 4's specific lifting of federal restrictions. Thus, as Congress used the phrase in § 5 of the 1959 Act, the Nonintercourse Act was not a statute that affected Indians because of their status as Indians.

### 2. The Canons Of Construction Applicable To Indian Laws Preclude Indirect Extinguishment Of Treaty Rights And Require That Ambiguities Be Resolved In The Tribe's Favor.

The Court of Appeals was likewise correct in applying the canons of construction to the 1959 Act. This Court

has consistently reaffirmed the cardinal principle that "congressional intent to extinguish Indian title must be 'plain and unambiguous.'" *Oneida II, supra,* 105 S.Ct. at 1258, *quoting United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 346 (1941). Doubtful or ambiguous expressions in statutes ratifying agreements with the Indians are not to be construed to their prejudice; rather, they are to be resolved liberally in the Indians' favor, as they would have understood. *Antoine v. Washington,* 420 U.S. 194, 199-200 (1975). In *Menominee Tribe v. United States,* 391 U.S. 404 (1968), the Court, faced with a similar situation, refused to find an abrogation of federally-protected treaty rights through the indirect method of a termination act's general lifting of federal supervision.

The general assimilationist policy pronouncements that attended the enactment of all termination legislation have never been relied on by this Court to justify an indirect, backhanded extinguishment of Indian treaty rights. *Menominee Tribe, supra; see Bryan v. Itasca County,* 426 U.S. 373 (1976). As the Court noted in *Bryan,* "courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected . . .'" *Id.* at 388, n. 14.[36]

These principles are fully applicable here. The 1959 Act does not mention the 1763 Treaty claim. With provisions much less clear than even the Menominee Act regarding applicability of state law, the 1959 Catawba Act removes federal restrictions from only a 3,434-acre tract of federally-held trust land, leaving the 1763 Treaty lands,

[36]This is particularly so where, as here, the Act is somewhat removed both in time and federal policy from the fervent assimilationist policy announced in House Concurrent Resolution No. 108. As we have noted, the 1959 Act was passed near the end of the termination era, at a time when federal termination policy had been modified to require informed tribal consent. Moreover, the Catawbas were never "wards of the Federal Government," H.R. Rep. No. 910, *supra* at 2673 (J.A. 123), in the same sense as were the tribal Indians subject to a full-fledged federal trusteeship at whom the termination policy was primarily directed. Indeed, the title of the 1959 Act is the Catawba Division of Assets Act and neither the word "terminate" nor any of its variants appears in the Catawba Act, as it does in each of the other termination acts.



like the Menominee Treaty rights, wholly outside the purview of the Act. Removal of federal protection and extinguishment of the Catawbas' Treaty claim can come about only through the same "backhanded" method that this Court refused to sanction in *Menominee Tribe, i.e.,* a general lifting of federal supervision resulting in the extinguishment of specific treaty property rights. Moreover, the glaring ambiguities on the face of the Act would have to be resolved against the Tribe. Finally, and most significantly, the assurances upon which the United States secured the Tribe's consent would be rendered meaningless.

## II. THE 1959 ACT DID NOT EXTINGUISH THE TRIBE'S STATUS AS A TRIBE.

Petitioners argue in the alternative that § 5 of the 1959 Act extinguished tribal political existence which precludes the Tribe's ability to maintain this action. As we understand this argument, it concedes that a claim survived the 1959 Act but contends that no entity capable of enforcing it survived. In any event, it is certain that Congress specifically contemplated the ongoing political existence of the Tribe, intending only to extinguish the 16-year federal obligation to participate in the joint rehabilitation effort under the Memorandum of Understanding. The 1959 Act on its face provides for the continued existence of the 630-acre state Reservation, provides for some 1943 Reservation lands to be set aside for tribal purposes and refers to the "tribe" prospectively, providing in § 5 that the "tribe" and its members "shall" henceforth be ineligible for federal Indian services and in § 6 that the rights of the "tribe" under South Carolina law "shall' be unaffected.[37]

Even where Congress acted to terminate much lengthier and more expansive trust relationships than that involved here, such action did not operate to end the exist-

[37]The Solicitor General agreed with the Court of Appeals' ruling that the Tribe has the capacity to bring this suit, but expressed no view about whether the 1959 Act precluded the Tribe as a matter of law from establishing that it is an Indian Tribe for purposes of the Trade and Intercourse Act. He concluded instead that the Tribe could maintain this suit as a successor-in-interest. U.S. Br. at 8-9, n. 8.

ence of the affected tribes: rather, what was terminated was a relationship between the tribe and the United States. *See Menominee Tribe v. United States,* 388 F.2d 998, 1000 (Ct. Cl. 1967)), *aff'd* 391 U.S. 404 (1968) (Menominee Termination Act "did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the Tribe.") (emphasis in original); *Kimball v. Callahan,* 590 F.2d 768, 775-6 (9th Cir.), *cert. denied,* 442 U.S. 915 (1979) (sovereign authority of Klamath Tribe to regulate tribal hunting and fishing unaffected by termination act); *see* F. Cohen, *Handbook of Federal Indian Law* 19, 815 (1982 ed.); *see also* S. Rep. No. 481, 96th Cong., 1st Sess. 13 (use of term "federal trust relationship," rather than "federal recognition," in act restoring terminated tribe "would insure that what is restored to the tribe . . . is the same as what was diminished or lost under the 1954 [termination] Act.").

Petitioners rely heavily on the 1959 Act's revocation of the Tribe's constitution in support of their argument. The committee reports on the 1959 Act, however, show that Congress understood well that the Tribe's constitution had been adopted pursuant to the Memorandum of Understanding in order that the State and the BIA would have a more structured government with which to contract for the delivery of services:

> In the memorandum of understanding the tribe agreed to organize to transact community business, and on June 30, 1944, an IRA constitution and bylaws were approved by the Secretary of the Interior.

H.R. Rep. No. 910, *supra* at 2674 (J.A. 125-126). As the Court of Appeals correctly held, § 5's revocation of the tribal constitution was part of the overall legislative scheme to withdraw the BIA from the 1943 agreement and return the State and the Tribe to their pre-1943 status.

Moreover, because tribal powers of self-government are not derivative of federal powers,[38] revocation of the

[38]Indian tribes have always been recognized as "distinct, independent, political communities," Worcester v. Georgia, 31

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Tribe's federal constitution cannot be said to extinguish the Tribe's political existence. It is axiomatic that tribal political existence is in no way dependent upon federal approval or recognition of any particular form of government.[39] Indeed, independent political existence was required by the IRA before a tribe would be permitted to organize under its provisions, *see* F. Cohen (1982 ed.), *supra* at 13-15, and the Catawba Tribe was no exception.

The Catawba tribal constitution revoked by the 1959 Act was adopted by the Tribe pursuant to § 16 of the IRA. Prior to authorizing the Catawba Tribe's IRA election, the Solicitor of the Department of the Interior ruled that the Catawbas existed politically:

> The files are full of evidence which is conclusive that a tribal organization has been continuously maintained by these Indians over a long period of time. The Indians have done business as a tribe and the relationship between the tribal organization and its members conforms to the usual tribal pattern. There can be no doubt that the Catawba Indians now exist as a tribe

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U.S. (6 Pet.) 515, 559 (1832), whose sovereign powers may be recognized, but are not created, by the federal government. Talton v. Mayes, 163 U.S. 376 (1896); United States v. Wheeler, 435 U.S. 313, 322, 328 (1978); McClanahan v. Arizona Tax Comm., 411 U.S. 164, 172-3 (1973); *see Powers of Indian Tribes,* Mem. Sol. Int., 55 I.D. 14, 19, 30 (Oct. 25, 1934).

[39]Tribal governments have always varied widely in degree of structure and organization. *See* F. Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.); Montoya v. United States, 180 U.S. 261, 265 (1901). In 1934 Congress enacted the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§ 461-479 ("IRA") to encourage tribes to adopt a more formal structure. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-2 (1973); *see* F. Cohen, *supra* (1982 ed.) at 18, n. 107. The Act provided that a tribe "may" adopt a constitution and bylaws, by majority vote, and also provided for revocation of a constitution upon a majority vote, 25 U.S.C. §§ 476, 478. Under the IRA, the Secretary conducted 258 elections in which 181 tribes elected to organize under the Act and 77 tribes, including the largest (Navajo), rejected it. *See* Kerr-McGee Corporation v. Navajo Tribe of Indians, 105 S.Ct. 1900, 1902; Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 Mich. L. Rev. 955, 972 (1972); *see also* F. Cohen (1982 ed.), *supra* at 150.

and have had a known tribal existence for almost a century.

The Solicitor further ruled that the Catawbas had been a federally-recognized tribe since 1848, had continuously "retained their tribal organization ever since . . ." and were therefore entitled to vote on an IRA constitution. *Questions Of the Catawbas' Identity and Organization As A Tribe And Right To Adopt An IRA Constitution,* Mem. Sol. Int. (April 11, 1944), *reprinted in* II *Interior Opinions* at 1261 (J.A. 51-52).

It is certain that Catawba tribal political existence was not dependent upon or founded in its IRA constitution. The Tribe's recognized political existence predated its adoption of an IRA constitution by more than 200 years (R. Vol. VI, Ex. 1)—or since 1848 according to the Solicitor—and the revocation of that document cannot logically be said to extinguish an existence not in any way founded within it. The tribal constitution had been adopted to facilitate the 1943 rehabilitation program, and its revocation was simply part of the overall legislative plan to return the Tribe to its pre-1943 status. The State has continued to hold the 630-acre reservation acquired in 1842 in trust for the Tribe. Op. Atty. Gen. S.C., No. 3988 (March 6, 1975) (R. Vol. VI, Ex. 15).

### III. EVEN IF STATE LAW WERE TO APPLY, THE TRIBE WOULD STILL HAVE SIGNIFICANT CLAIMS.

Because South Carolina, alone among the state jurisdictions, does not permit tacking of successive periods of possession by adverse occupants in order to establish title pursuant to its 10-year statute of limitations, S.C. Code Ann. § 15-3-340 (1976), an 18-year delay under South Carolina law would not establish even a presumption of title. Indeed, the United States concedes that application of state statutes of limitations to the Tribe's claim might not immediately resolve the underlying controversy (U.S. Br. at 17, 20).

South Carolina law is clear. As the foremost commentator on South Carolina property law has observed:

> The rule in this state, contrary to the view of the overwhelming majority of jurisdictions, is that even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations.



D. Means, *Survey of Property Law,* 10 S.C.L.Q. 90 (Fall 1958). Professor Means' statement is supported by an unbroken line of South Carolina Supreme Court decisions. *See Adams v. Adams,* 220 S.C. 131, 66 S.E.2d 809 (1951); *Haithcock v. Haithcock,* 123 S.C. 61, 68, 115 S.E. 727, 729 (1928) ("A man cannot tack, in order to make ten years . . . . The 10 years must be 10 years in himself alone, or by way of inheritance", *quoting with approval* trial judge's jury charge); 7 R. Powell, *The Law of Real Property,* ¶ 1014[2] at 91-63 (1984).

In *Crotwell v. Whitney,* 229 S.C. 213, 220-21, 92 S.E. 2d 473, 477 (1956), the South Carolina Supreme Court stated plainly that the adverse occupant has the burden of establishing possession for the entire 10-year statutory period without tacking:

> Plaintiffs having established their legal title to the premises, appellant['s] . . . claim of title by adverse possession required proof of actual, open, notorious, hostile, continuous and exclusive possession by him, or by one or more persons through whom he claimed, for the full statutory period of ten years, *without tacking of possession* except by descent cast. Code 1952, Sections 10-2421 [now codified as § 15-67-210], 10-124 [now codified as § 15-3-340]; . . . (citations omitted, emphasis added).

*See also Gregg v. Moore,* 226 S.C. 366, 371, 85 S.E.2d 279, 281 (1954) ("The burden of proof of adverse possession is on the party relying thereon . . . ."). Thus, in order to defeat the Tribe's claim of title, each defendant would be required to prove open, hostile, notorious and continuous possession for a 10-year period.[40]

[40]It is also certain that under South Carolina law, those defendants against whom the claim was not barred by the 10-year statute of limitations could not invoke the equitable defense of laches. "Laches within the period of the statute of limitations is no defense at law." Crotwell v. Whitney, *supra,* 229 S.C. at 223, 92 S.E.2d at 478.

The consistent line of South Carolina Supreme Court decisions demonstrates that South Carolina's anti-tacking rule and the 10-year statute of limitations are inextricably linked: the 10-year limitations period contained in S.C. Code Ann. § 15-3-340 (1976) may only be asserted by an adverse possessor who has been in possession for at least 10 years. *Crotwell v. Whitney, supra;* Note, *Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grant, and Prescriptive Right in South Carolina,* 10 S.C.L.Q. 292, 298 (Winter 1958); *see* 7 R. Powell, *supra,* ¶ 1012[2] at 91-4 ("The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment by the record owner would be barred by the statute of limitations.").

Petitioners argue, however, that S.C. Code Ann §§ 15-3-340 (statute of limitations) and 15-67-210 (adverse possession) (1976) set up two different defenses to an action to recover possession: (1) that the plaintiff has not possessed the land within the past ten years, and (2) that defendant has adversely possessed the land for ten years. They assert that the anti-tacking rule applies only to the second, whereas petitioners rely upon the first. Lastly, petitioners attempt to derive significance from the fact that the two statutory sections appear in different chapters of the Code.

Petitioners' attempt to sever the relationship between these two statutory sections has no foundation in law. At the time of enactment, the predecessors of the present sections appeared as sections 101 and 104 of the same Act. *See* 14 Stats. of S.C. 444 (1870). It is apparent from the text of the two sections that § 15-67-210 refines and modifies § 15-3-340:

> § 15-3-340. First and second actions by individual for recovery of land.
>
> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.



> § 15-67-210. Presumption of possession; when occupation deemed under legal title.
>
> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

The case law since enactment of the 1870 Act has uniformly recognized the integral relation between these two provisions. Indeed, had petitioners continued their quote from *Haithcock v. Haithcock, supra,* Pet. Br. at 27, they would have found, immediately after the assertion that possessors may defeat the owner's title by showing that he has not been in possession for ten years preceding the action, the explanation that South Carolina law presumes possession in anyone who shows legal title:

> Now, what is possession of land? I charge you that, under the law, if one shows paper title—a deed or will or legal paper title of any kind, to land—then the law presumes that he was in possession of that land, and that his title gives him the possession: that is, the possession follows the title. . . .
>
> In other words, gentlemen, the law presumes, where a man shows title, he need not be on the land, he need not be in 10 miles of the land, if he shows perfect legal title, then the law says the possession follows the title, and he is deemed to be in possession if he shows a good legal title to the land, although he may never have seen the land; and that presumption holds unless, and until, some one else goes on the land and occupies and holds it adversely to that right for 10 consecutive years.
>
> So I say, the establishment of a perfect legal title to a tract of land is a presumption that the person is in possession, unless and until someone else, by the pre-

> ponderance of the testimony, shows that he has been in actual adverse possession of that land for 10 consecutive years.

*Haithcock, supra,* 123 S.C. at 69-70, 115 S.E. at 729-30. Similarly, in *Love v. Turner,* 71 S.C. 322, 330, 51 S.E. 101, 104 (1904), the South Carolina Supreme Court stated: "If the plaintiff had the legal title, he was presumed to be possessed of the land within the 10 years, and it was necessary to rebut this presumption by proof of continuous adverse possession of some other person for 10 years", [*citing Garrett v. Weinberg,* 48 S.C. 28, 26 S.E. 3 (1896)]. These cases make clear that there are not two, but one, statutory defense, and that adverse possession and the statute of limitations are two names for the same legal rule.

Petitioners' assertion that the Tribe "admittedly did not possess the land at any time during the ten years before they commenced this action" (Pet. Br. at 28) is therefore flatly incorrect. The Tribe's perfect title is presumed for purposes of this motion and therefore, under South Carolina law, the Tribe is presumed to be in possession under § 15-3-340 until someone else proves "actual adverse possession of that land for 10 consecutive years." *Haithcock, supra,* 123 S.C. at 70, 115 S.E. at 730.

## CONCLUSION

Petitioners read far too much into the 1959 Act. It was legislation of limited scope, designed only to implement a clear understanding between the Tribe and the federal government that certain lands would be distributed; but only on the condition that this claim be unaffected. Absent a clear expression of congressional intent to abrogate, the assurances upon which tribal consent was obtained are controlling. Congress professed only to be acting consistently with tribal consent and neither the Act nor its history even suggests an intent to extinguish or modify this claim. Congress in 1959 did not intend to deprive the Tribe of its opportunity to resolve the claim it had so persistently sought to protect.

The judgment and opinion of the Court of Appeals should be affirmed.



Respectfully submitted,

Don B. Miller
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Jean H. Toal
BELSER, BAKER, BARWICK, RAVENEL,
TOAL & BENDER
P.O. Box 11848
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

Robert M. Jones
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

Mike Jolly
Richard Steele
113 West Main Street
Union, SC 29379
(803) 427-8471

No. 84-782

# In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA, ET AL., PETITIONERS

*v.*

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

JACQUES B. GELIN
ARTHUR E. GOWRAN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the enactment in 1959 of the Catawba Indian Tribe Division of Assets Act (Catawba Act), 25 U.S.C. 931 *et seq.*, ratified the 1840 conveyance by the Tribe to the State of South Carolina of the Tribe's interest in the 144,000-acre tract at issue or extinguished the Tribe's claim that that transaction violated the restraint on alienation in the Trade and Intercourse Act.

2. Whether Section 5 of the Catawba Act — which provides that upon revocation of the Tribe's constitution, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to the Tribe and its members and the laws of the several States shall apply to them in the same manner as they apply to other persons —made the South Carolina statute of limitations and law of adverse possession applicable to the respondent Tribe's claim when the Tribe's constitution was revoked on July 1, 1962.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

## STATUTORY AND TREATY PROVISIONS INVOLVED

Section 5 of the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. 935, and the pertinent provision of the Treaty of Augusta of 1763 between Great Britain and various Indian Tribes are reproduced as an appendix to this brief.

## STATEMENT

1. a. The aboriginal home of the Catawba Indian Tribe consisted of parts of what are now the States of North and South Carolina.[1] In 1760, the Tribe and the Superintendent of Indian

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[1]The district court granted summary judgment for petitioners on the basis of undisputed facts and allegations in the respondent Tribe's complaint that it assumed to be true (Pet. App. 4a, 6a-7a). The historical background of the case set forth in the text is drawn primarily from the district court's and court of appeals' recitation of those facts and allegations (*id.* at 7a-10a, 41a-47a).

Affairs for Great Britain entered into the 1760 Treaty of Pine Tree Hill, under which the Tribe relinquished its aboriginal territory in exchange for a 144,000-acre tract of land (Pet. App. 6a-7a).[2] In 1763, representatives of the British Crown and the Catawbas and other Indians in the Southeast entered into the Treaty of Augusta, under which the Tribe again agreed to settle on a 144,000-acre tract in South Carolina. App., *infra,* 1a. The United States did not subsequently enter into a treaty with the Catawbas. Pet. App. 7a, 42a; C.A. App. 134-138, 256, 485, 502, 515; H.R. Rep. 910, 86th Cong., 1st Sess. 3 (1959). See C. Hudson, *The Catawba Nation* 50-51 (1970).

By the 1830's, almost all of the 144,000 acres referred to in the Treaty of Augusta had been leased by the Tribe to non-Indians pursuant to state statutes (C.A. App. 250). In 1840, the Tribe and South Carolina entered into the Treaty of Nation Ford (*id.* at 258). Under that Treaty, the Tribe relinquished the 144,000 acres to the State, and South Carolina agreed to spend $5,000 to acquire a new reservation for the Tribe, to pay $2,500 upon the Tribe's removal from its former lands, and to make nine annual payments to the Tribe in the amount of $1,500. In 1842, the State purchased approximately 630 acres for $2,000 as a new reservation for the Tribe. This 630-acre tract is still held in trust by South Carolina for the Tribe. Pet. App. 7a-8a, 43a; C.A. App. 152-156; C. Hudson, *supra*, at 64-65, 86-87.

b. In 1943, the Office of Indian Affairs of the Department of the Interior, the State of South Carolina, and the Tribe entered into a Memorandum of Understanding (C.A. App. 309-313). In accordance with this agreement, South Carolina purchased 3,434 acres of land and conveyed it to the United States to be held in trust for the Tribe. The federal Office of Indian Affairs agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with educational and medical

[2]The parties were unable to furnish the court with any documents containing the terms of the 1760 Treaty of Pine Tree Hill, but the court assumed for purposes of its decision that the Treaty existed and granted the Catawbas some interest in the land in issue (Pet. App. 42a; see C.A. App. 150). See D. Brown, *The Catawba Indian* 239-245 (1966); H.R. Rep. 2503, 82d Cong., 2d Sess. 263 (1952).



benefits. The Tribe, in turn, agreed to organize and to conduct its affairs on the basis of the federal government's recommendations, and it subsequently did organize under the Indian Reorganization Act, 25 U.S.C. 461 *et seq.* Pet. App. 8a-9a, 43a; C.A. App. 488.[3]

c. In September 1954, in accordance with Congress's then-current termination policy, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was among various groups able to take responsibility for their affairs and therefore was ready for termination of federal services. H.R. Rep. 2680, 83d Cong., 2d Sess. 2-3 (1954).[4] The Tribe also desired an end to federal restrictions on alienation of its lands in order to facilitate financing for homes, farming, and improvements. Accordingly, a tribal resolution adopted on January 3, 1959, recommended the enactment of legislation "to accomplish the removal of Federal restrictions against the alienation of Catawba land" and to distribute tribal assets. However, the resolution expressed the desire that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe" (C.A. App. 337).

[3]The final 1943 Memorandum of Understanding omitted a provision in an earlier draft that would have required the Catawbas " 'to execute, in favor of the State of South Carolina, a release and quitclaim of all claims and actions, of whatsoever nature against the State of South Carolina' " (C.A. App. 306). The Solicitor of the Interior Department commented that "[t]his elimination is most desirable in that it avoids a procedure of doubtful legality which would have consisted in using a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts" (*ibid.*).

[4]Witnesses testifying at the 1959 hearings on the termination bill for the Catawbas (see page 4, *infra*) stated that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. Most adult male Catawbas were employed at the time: 47% were in industry, 20% in skilled labor, 7% in the armed services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. See generally *Division of Tribal Assets of Catawba Indian Tribe: Hearings on H.R. 6128 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 86th Cong., 1st Sess. 8, 22, 26-27, 100-101 (1959) (unpublished) [hereinafter cited as *Hearings*]. See also C.A. App. 477-478, 482, 493.

After Congress was assured that the Tribe desired termination (see *Hearings, supra* note 4, at 9, 18, 84-85; C.A. App. 337, 483-484, 501-507), it enacted the Catawba Indian Tribe Division of Assets Act (Catawba Act), 25 U.S.C. 931 *et seq.*, in 1959. On July 1, 1960, the Secretary of the Interior published a notice stating that a majority of the Tribe's members agreed to a division of the tribal assets in accordance with the Catawba Act (25 Fed. Reg. 6305), and on July 1, 1962, the Secretary revoked the Tribe's constitution as required by Section 5 of the Catawba Act, 25 U.S.C. 935 (App., *infra*, 1a). Thereafter, the 3,434-acre reservation that had been acquired for the Tribe pursuant to the 1943 Memorandum of Understanding was distributed among the members of the Tribe in accordance with Section 3 of the Catawba Act, 25 U.S.C. 933. Pet. App. 9a-10a, 46a.

2. On October 28, 1980, this suit was filed in the United States District Court for the District of South Carolina by respondent Catawba Indian Tribe, a non-profit organization incorporated under South Carolina law in 1975. The Tribe sought possession of the 144,000 acres that had been conveyed to the State in 1840 and trespass damages for the period of the Tribe's dispossession. Named as defendants, petitioners herein, were the State of South Carolina and approximately 90 other defendants, who also were sued as representatives of a class that was alleged to consist of approximately 27,000 persons who claimed an interest in the land. The Tribe alleged that the 144,000-acre tract was reserved to it by the 1760 Treaty of Pine Tree Hill and the Treaty of Augusta of 1763; that it came within the scope of federal restrictions against alienation upon the adoption of the Constitution and Section 4 of the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 138; and that the 1840 conveyance of the Tribe's interest in the land to the State was void because it was not approved by the United States. Pet. App. 10a, 36a.

The district court granted summary judgment for petitioners on a number of grounds. First, the court held that Section 5 of the Catawba Act made the 10-year state statute of limitations under S.C. Code Ann. § 15-3-340 (Law. Co-op. 1977) applicable to the Tribe's claim as of July 1, 1962, and that this suit, which was filed in 1980, is time-barred under that provision (Pet. App. 47a-50a). Second, the court held that the Catawba Act precludes



respondent as a matter of law from establishing that it currently is an Indian tribe within the meaning of the Trade and Intercourse Act because the Catawba Act terminated the Tribe's existence as a governmental entity (Pet. App. 51a). Third, the court held that respondent could not establish the continued existence of a trust relationship between it and the United States because the Catawba Act terminated that relationship (*id.* at 52a). Fourth, the court held that the Catawba Act ratified the 1840 transaction between the Tribe and the State (*id.* at 51a-52a).

3. a. A divided panel of the court of appeals reversed and remanded for further proceedings (Pet. App. 4a-28a). Although the House and Senate Reports reflected Congress's awareness of the 1840 transaction, the court of appeals found no indication that Congress desired to extinguish tribal claims against South Carolina arising out of that transaction (*id.* at 13a-16a). The court also concluded that the revocation of the Tribe's constitution "did not terminate the Tribe" (*id.* at 17a), which "continued as a body of Indians, united in a community under one leadership, and inhabiting a particular territory" (*id.* at 18a).

For like reasons, the court of appeals held that Section 5 of the Catawba Act did not end the trust relationship that was established by the Trade and Intercourse Act with respect to the 144,000-acre tract (Pet. App. 18a-22a). The court believed that the language in Section 5 which provides that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them" made federal statutes inapplicable only to individual Indians, not to the Tribe. Insofar as the Tribe is concerned, the court concluded that the Act terminated only federal supervision under the 1943 Memorandum of Understanding, not the trust relationship arising under the Trade and Intercourse Act (Pet. App. 21a-22a). The court of appeals also rejected petitioners' contention that this suit is subject to the state statute of limitations by virtue of the provisions of Section 5 of the Catawba Act that remove the protections of federal law and make state law applicable to the Catawbas (Pet. App. 22a-23a).

b. Judge Hall dissented (Pet. App. 24a-28a). He was of the view that the Catawba Act "unquestionably terminated the Tribe's legal existence, ended any trust relationship between the

Catawbas and the federal government, and made South Carolina law fully applicable to whatever claim [respondent] may have had to the Tribe's ancestral land" (*id.* at 24a).

c. On rehearing, the en banc court reversed the judgment of the district court for the reasons given by the panel and remanded for further proceedings (Pet. App. 1a-3a). Judge Murnaghan filed a concurring opinion in which he expressed concern for innocent landowners and suggested that equitable considerations might preclude relief against them and instead point to a monetary remedy against South Carolina or the United States (*id.* at 30a-34a). Judges Widener, Hall and Phillips dissented for the reasons stated in Judge Hall's opinion dissenting from the panel's decision (*id.* at 3a).

## DISCUSSION

Section 5 of the Catawba Act provides that, after the Tribe's constitution is revoked, federal statutes that affect Indians because of their status as such shall be inapplicable to the Tribe and its members and state laws shall apply to them in the same manner as they apply to all other persons in the State. Contrary to the court of appeals' conclusion, these provisions of Section 5 plainly made the South Carolina statute of limitations applicable to the Tribe's claim as of July 1, 1962, when the Tribe's constitution was revoked. Although this case is in an interlocutory posture and the issues presented directly affect only the claim of the Catawba Tribe, in our view the court of appeals' error is sufficiently clear and the impact of that error on the 27,000 potential defendants is sufficiently immediate that the Court should grant review.

1. Before addressing the statute of limitations issue, it is appropriate to consider whether the Catawba Act itself ratified the 1840 transaction between the Tribe and South Carolina or otherwise extinguished the Tribe's claim to the land covered by that transaction. We conclude that it did not, and, as to this issue, we agree with the court of appeals.[5] Although the Catawba Act

[5]Petitioners challenge this holding by the court of appeals only in passing (Pet. i (Question 3), 21-22). Petitioners cite (Pet. 21 & n.49) provisions in other termination acts for the proposition that Congress knew how to preserve federal claims when it desired to do so. See 25 U.S.C. 677r, 706 and 976. However, each of these provisions preserved tribal claims that previously had been filed against the *United States*, presumably under the Indian Claims Commission Act, which otherwise might have been thought to be eliminated by Congress's termination of the trust relationship between the United States and the tribe. The omission of any similar provision in the Catawba Act presumably is due to the fact that the Catawbas did not have an action pending against the United States under the Indian Claims Commission Act. See S. Rep. 863, 86th Cong., 1st Sess. 3 (1959).



itself makes no mention of the 1840 transaction, the district court relied on the fact that the House Report refers to that transaction[6] and that Section 2 of the Catawba Act, 25 U.S.C. 932, refers to the "assets" held in trust for the Tribe by South Carolina, which assets consist of the 630 acres that were purchased as a result of that transaction. The district court believed that this treatment of the assets in the Catawba Act constituted an "implicit ratification" of the 1840 transaction (Pet. App. 51a-52a). Especially in light of this Court's recent decision in *County of Oneida* v. *Oneida Indian Nation* (*Oneida II*), No. 83-1065 (Mar. 4, 1985), the district court's conclusion was erroneous.

In *Onedia II*, the Court reiterated the established rule that "congressional intent to extinguish Indian title must be 'plain and unambiguous' * * * and will not be 'lightly implied,' " in light of "the strong policy of the United States 'from the beginning to respect the Indian right of occupancy' " (slip op. 20, quoting *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345, 346, 354 (1941)). In the Court's view, the mere reference to the Oneidas' 1795 transaction in the 1798 and 1802 Treaties ratified by the Senate "far from demonstrate[d] a plain and unambiguous intent to extinguish Indian title," since there was "no indication that

[6]See H.R. Rep. 910, 86th Cong., 1st Sess. 2 (1959):

> The Catawba Indians' relations with the Federal Government date back only to the 1940's. Their original reservation was set aside for them by treaty with South Carolina in 1763. In 1840 they agreed to cede this reservation to the State except for a single square mile of land which is still held in trust for them by the State. In return the State agreed to furnish certain essential services for them.

The Senate Report repeats this language verbatim. See S. Rep. 863, 86th Cong., 1st Sess. 1 (1959).

either the Senate or the President intended by these references to ratify the 1795 conveyance" (slip op. 20). It follows *a fortiori* that no ratification and extinguishment occurred here. There is not even any mention of the prior transaction in the text of the Catawba Act, as there was in the text of the treaties ratified by the Senate in *Oneida II*. Nor do the passages in the committee reports suggest an affirmative intent by Congress to ratify the 1840 transaction; they appear to be nothing more than recitations of historical fact.[7]

2. Although the Catawba Act did not in itself ratify the 1840 transaction as a matter of *federal* law, that Act did have the effect of subjecting the Tribe's claim to the operation of *state* law, including the 10-year statute of limitations (S.C. Code. Ann. § 15-3-340 (Law. Co-op. 1977)), beginning on July 1, 1962, when the Tribe's constitution was revoked.[8] In *Oneida II*, the Court

[7]Moreover, the Catawba Act should be construed in light of the resolution adopted by the Catawbas on January 3, 1959, expressing the desire that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe" (C.A. App. 337). This language admittedly might be read to refer only to a claim against the State alone, under state law, for a breach of the 1840 agreement, resulting from the State's failure to find another home for the Catawbas and to make the promised appropriation of funds. However, in light of the Tribe's prior assertions that the 1840 transaction violated the Trade and Intercourse Act (C.A. App. 185-187) and the canon of construction that ambiguous expressions are to be construed in the Indians' favor (see, *e.g.*, *Oneida II*, slip op. 19), the quoted passage in the resolution might also be read to reflect a desire to preserve a claim based on federal as well as state law, if that were necessary to vindicate the Tribe's interests. Because the Catawba Act was drafted to carry out the intent of the resolution (C.A. App. 338, 502; 105 Cong. Rec. 5162 (1959) (remarks of Rep. Hemphill); *Hearings, supra* note 4, at 8-10 (remarks of Rep. Hemphill)), this ambiguity in the resolution further cautions against reading the Catawba Act itself as a bar to this suit.

[8]The court of appeals also reversed the district court's holding (Pet. App. 51a) that the Catawba Act precludes the Tribe as a matter of law from establishing that it is an "Indian tribe" for purposes of the Trade and Intercourse Act and therefore precludes it from bringing a suit under that Act (see Pet. App. 17a-18a). Whatever the proper resolution of this issue as a general matter, we believe respondent has the capacity to bring the instant suit. The fact that Congress directed the Secretary to



reaffirmed the established rule that under the Supremacy Clause, state-law time bars do not apply of their own force to Indian claims to recover land that allegedly was conveyed in violation of restraints on alienation under federal law. Slip op. 13 n.13. But in Section 5 of the Catawba Act, Congress rendered that general rule inapplicable to the Catawbas.

a. Section 5 provides that after revocation of the Tribe's constitution, "the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." The last clause expressly provides that state laws shall apply to "them" — *i.e.*, to the "tribe and its members" referred to in the first clause. The Court has described this language as expressing a congressional intent to subject the Indians affected to the "full sweep" and "full range" of state laws. *Bryan* v. *Itasca County*, 426 U.S. 373, 389-390 (1976). It is consistent with that interpretation to read the third clause to trigger the application of the state statute of limitations to any interests in land claimed by the Tribe and its members.

The second clause just quoted also has the effect of making state law applicable, because it frees any land claimed by the Tribe from the protective umbrella of federal law, including the

revoke the Tribe's constitution and provided that the Tribe would retain no special status under federal law did not mean that respondent, as its successor-in-interest, could not thereafter hold or seek to recover whatever property interests the Tribe owned prior to enactment of the Catawba Act and revocation of the tribal constitution. Compare *Menominee Tribe* v. *United States*, 391 U.S. 404, 409-413 & n.10 (1968). As the court of appeals pointed out (Pet. App. 18a), the State of South Carolina continues to hold 630 acres in trust for the Tribe. Moreover, the Catawba Act provides that certain of the lands held in trust by the United States in 1959 could be retained for tribal purposes (§ 3(b), 25 U.S.C. 933(b)), and the Catawba Act expressly does not affect the rights of the "tribe" under South Carolina law (§ 6, 25 U.S.C. 936).

restraint on alienation in the Trade and Intercourse Act.[9] Because the Tribe was free after 1962 to sell whatever interest it had in the land at issue in this case,[10] the Tribe likewise was obligated to assert its title within the time specified by the state statute of limitations and became subject to losing that title altogether by operation of state rules of adverse possession. See, *e.g.*, *Schrimpscher* v. *Stockton*, 183 U.S. 290, 295-297 (1902); *United States* v. *Waller*, 243 U.S. 452, 463-464 (1917); *Dillon* v. *Antler Land Co.*, 341 F. Supp. 734, 740-741 (D. Mont. 1972), aff'd, 507 F.2d 940, 942, 944 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975); *Dennison* v. *Topeka Chambers Industrial Development Corp.*, 527 F. Supp. 611, 623 (D. Kan. 1981), aff'd, 724 F.2d 869 (10th Cir. 1984). See also *United States* v. *Schwarz*, 460 F.2d 1365, 1371-1372 (7th Cir. 1972).

To be sure, even after 1962, the Tribe's asserted interest in the 144,000-acre tract continued to *derive* from federal law, by virtue of the established policy of the United States after adoption of the Constitution to respect Indian occupancy. *Oneida II*, slip op. 7-8; *Oneida Indian Nation* v. *County of Oneida* (*Oneida I*), 414 U.S. 661, 666-672 (1974). But that fact alone does not immunize an Indian tribe from state limitations law with respect to a claim to regain possession — anymore than it does grantees or patentees from the United States. See *Oneida I*, 414 U.S. at 676. See, *e.g.*, *Larkin* v. *Paugh*, 276 U.S. 431, 439 (1928); *United States* v. *Waller*, 243 U.S. at 463-464; *Dickson* v. *Luck Land Co.*, 242

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[9]The Trade and Intercourse Act clearly is a "statute[] of the United States that affect[s] Indians because of their status as Indians * * *." § 5, 25 U.S.C. 935. Congress's lifting of that Act also necessarily rendered inapplicable the common law restraint on alienation that the Act simply codified. See *Oneida II*, slip op. 6-8, 12.

[10]This freedom to alienate of course did not apply to the Tribe's 3,434-acre reservation that had been purchased by South Carolina and conveyed to the United States to be held in trust for the Tribe. See page 2, *supra*. Because the United States held legal title to those lands, the Tribe obviously could not sell them. Accordingly, Section 3 of the Catawba Act, 25 U.S.C. 933, provided for the Secretary to distribute those assets to tribal members. However, the United States never held the remainder of the 144,000-acre tract in trust for the Tribe, and it therefore would not have been necessary for the Secretary to participate in the sale of that land.



U.S. 371, 375 (1917). What uniquely immunizes the title of Indian tribes from state-law rules is the fact that, absent termination of the special relationship, the continuing tribal right to occupy the land remains protected by federal law. See *Oneida I*, 414 U.S. at 677; *id.* at 684 (Rehnquist, J., concurring); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 670-671 & n.18 (1979). It follows that when this federal protection is removed, the Supremacy Clause no longer inhibits the operation of state-law time bars such as statutes of limitations and rules of adverse possession. See *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957).

b. The court of appeals did not disagree with the foregoing principles. But it sought to avoid the result they compel by reading the pertinent language in Section 5 of the Catawba Act as applying only to individual members of the Tribe, not to the Tribe itself. From this premise, the court concluded that in the particular circumstances of the Catawba Tribe, Congress had *not* lifted the federal restraint on alienation of the 144,000-acre tract or made the state statute of limitations applicable to the Tribe's claim to that land. See Pet. App. 19a-22a. We believe this construction of Section 5 is clearly wrong.

The second clause of the pertinent sentence of Section 5, quoted above (see page 9, *supra*), provides that after revocation of the Tribe's constitution, "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, * * *." The court of appeals reasoned that this clause refers only to "Indians," not "Indian tribes," and that Congress therefore did not render special federal Indian statutes inapplicable to the Tribe. As petitioners argue, the court of appeals' construction "is not even grammatically possible" (Pet. 23; see also Pet. Reply Br. 3-5).

The operative word in the second clause for present purposes is not "Indians," as the court of appeals seemed to believe, but "them." The word "them" obviously refers to the phrase "the tribe and its members" in the first clause, which makes the "tribe and its members" ineligible for special services furnished by the federal government. The word "Indians" in the second clause,

upon which the court of appeals relied, appears only in an adjectival phrase that describes *which* "statutes of the United States" shall be inapplicable to the tribe and its members — namely, those statutes "that affect Indians because of their status as Indians." Thus, the second clause simply will not bear the construction given it by the court of appeals.[11] The Tribe's related contention (Br. in Opp. 14-15) that the third clause makes state law applicable only to individual members of the Catawba Tribe is equally untenable, because the third clause makes state laws applicable to "them," which again refers back to the "tribe and its members" mentioned in the first clause.

The court of appeals' interpretation also is contrary to the Interior Department's contemporaneous construction of Section 5 in an explanatory memorandum prepared for distribution to the members of the Tribe in 1960, prior to the time a majority gave their consent to the Act's provisions (C.A. App. 529). In that transmittal, the Solicitor's Office explained that "just as the 'tribe' no longer will be a legal entity which will be governed by Federal laws which refer to 'tribes,' so the individual members will no longer be subject to laws which apply only to Indians" (C.A. App. 531). Thus, the Interior Department construed Section 5 to lift federal protections and immunities from the Tribe itself as well as from individual members of the Tribe. Nor does the Tribe even now offer any plausible explanation for why Congress would have intended the anomalous result it urges in a statute the principal purposes of which were to transfer tribal property out of federal control (§ 3, 25 U.S.C. 933) and to *terminate* the Tribe's special status under federal law.

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[11]The court of appeals' reasoning is flawed even if the court were correct in focusing on the word "Indians" in the second clause, because, as the court of appeals conceded (Pet. App. 20a), the word "Indians" has been construed to include an Indian tribe as well as individual Indians. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664-666 (1979). Furthermore, the first clause of Section 5 of the Catawba Act itself suggests that interpretation. That clause provides that "the tribe and its members shall not be entitled to any of the special services performed by the United States for *Indians* because of their status as *Indians*" (emphasis added). Obviously, by declaring the Tribe ineligible for federal services performed for "Indians," Congress meant to include services performed for Indian tribes.



c. In addition, this Court has identified the Catawba Act as one of "a series of termination statutes" (*Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 133 n.1 (1972)), and it was described by its sponsor as the "usual termination bill, with the usual provisions." *Hearings, supra* note 4, at 89. See also Pet. Reply Br. 6 nn. 12 & 13. Indeed, the Tribe disavows any argument that the Catawba Act is not a "termination" act. Br. in Opp. 17 n.15. It therefore is telling that the Tribe is claiming special protections under federal law and immunities from state law that are not available under any other termination act.

The Tribe suggests otherwise, arguing (Br. in Opp. 13 & n.9 (emphasis omitted)) that the same result would obtain under eight other termination acts because Congress provided in those acts that federal Indian statutes "shall no longer be applicable to the members of the tribe," but did not mention the tribe itself. What the Tribe fails to mention is that in six of these acts there is *other* language that explicitly terminated any trust relationship between the United States and the tribe concerned,[12] which necessarily terminated any "trust" relationship under the Trade and Intercourse Act; that the seventh act expressly provided for the withdrawal of federal "supervision" over tribal affairs,[13] which necessarily withdrew federal supervision of tribal land transactions under the Trade and Intercourse Act; and that the eighth act expressly preserved federal responsibility for the tribe, and thus has no bearing whatever on this case.[14] Moreover, as the

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[12]The language in 25 U.S.C. 564q, applicable to the Klamath Tribe, is typical. It provides for the Secretary to publish a proclamation "declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated." See also 25 U.S.C. 703 (Western Oregon Indians); 25 U.S.C. 757(a) (Paiute Indians of Utah); 25 U.S.C. (1976 ed.) 803(a) (Wyandotte Tribe of Oklahoma); 25 U.S.C. (1976 ed.) 823(a) (Peoria Tribe of Oklahoma); 25 U.S.C. (1976 ed.) 848(a) (Ottawa Tribe of Oklahoma).

[13]See 25 U.S.C. (1970 ed.) 891, 895 and 896 (Menominee Tribe); *Menominee Tribe* v. *United States*, 391 U.S. 404, 411 (1968). The provision parallel to Section 5 of the Catawba Act was 25 U.S.C. (1970 ed.) 899.

[14]See 25 U.S.C. 677u (Ute Indians of Utah). This Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), arose under that Act. The Tribe's reliance (Br. in Opp. 19-20 & n.18) on *Affiliated Ute Citizens* is therefore misplaced.

Tribe elsewhere concedes (Br. in Opp. 14-15), in all eight of these other termination acts, Congress expressly provided that state law shall apply to the tribe as well as its members, which alone was sufficient to trigger the application of the state statute of limitations.[15]

d. The court of appeals suggested (Pet. App. 17a-18a), however, that because the legislative history of the Catawba Act reflects an apparent understanding on the part of Congress that the United States' relationship with the Tribe arose exclusively out of the 1943 Memorandum of Understanding (see note 6, *supra*) and manifests an intent by Congress to abrogate that Memorandum, the Catawba Act should be given no broader effect that might bar the Tribe's claim. This suggestion is without merit.

Of course, the Congress that passed the Catawba Act in 1959 did not in this legislation, any more than in any statute, advert specifically to all the possible consequences when it enacted the general proposition that henceforward the Catawbas would be subject to state law like other citizens. And so it may be that Congress did not consider the potential effect of the Act on a claim regarding title to 144,000 acres. Indeed, that seems quite likely, since at the time — well before the decision of the First Circuit in *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1975), and this Court's decision in *Oneida I* — such "ancient land claims" had considerably less force than they do now. But it is idle to speculate about what provision the Catawbas would have sought, what the Interior Department would have proposed, what South Carolina might have suggested, or what Congress would have enacted if they had focused on the precise issue presented here, just as it is idle to speculate in regard to any concrete set of circumstances which came into

[15]As the Tribe also concedes (Br. in Opp. 13, 14-15), in the relevant provision of the only two remaining tribal termination acts, Congress expressly provided that state law was to be applicable and federal Indian statutes were to be inapplicable to the tribe as well as its members. 25 U.S.C. 726 (Alabama and Coushatta Indians); 25 U.S.C. 980 (Ponca Tribe). Application of the state statute of limitations obviously was triggered by these acts as well.



being as a result of later factual or legal developments. This is especially so given the lack of ambiguity in the text that Congress did enact: *i.e.*, that any and all claims which the Catawbas may have should be subject to state law in the same manner as those of other citizens.

The fact is that the Catawba Act is not equivocal. The language of Section 5 of the Catawba Act is as sweeping as that in other termination acts, which uniformly reflect an intent to abolish *all* trust relationships between the federal government and the tribe concerned, whatever their source. Congress's focus in this case on the 1943 Memorandum of Understanding does not preclude the application of the all-embracing statutory language and congressional purpose to another alleged trust relationship (under the Trade and Intercourse Act) that was not specifically mentioned in the legislative history. See, *e.g.*, *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983); *United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 8, 9-11. Nor has the Tribe pointed to any indication in the legislative history that Congress affirmatively intended in 1959 to preserve federal restrictions against alienation and immunities from state law for the Tribe's interest in a tract of land that Congress knew had been conveyed by the Tribe to the State almost 120 years earlier and that had not been occupied by the Tribe since that time. We therefore conclude that the 10-year state statute of limitations began to run on the Tribe's claim as of July 1, 1962.[16]

[16]The Catawbas' claim was included on the list of pre-1966 damage claims published by the Secretary pursuant to the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Tit. 1, § 2, 96 Stat. 1976, 28 U.S.C. 2415. See 48 Fed. Reg. 13920 (1983). As a result, the Tribe's claim, even insofar as it seeks trespass damages, is not barred by any generally applicable *federal* statute of limitations. See *Oneida II*, slip op. 14-16. But that listing does not exempt the Tribe's claim from the operation of the *state* statute of limitations that was made applicable by the Catawba Act. Nor does the listing of a claim for federal limitations purposes reflect a determination by the Department of the Interior that the claim has merit or is not otherwise barred.

We recognize that in 1977, the Solicitor of the Interior Department requested the Department of Justice to file an action on behalf of the

3. a. In addition to being clearly wrong on the central issue of law involving the application of the state statute of limitations, the court of appeals' decision is also of sufficient importance to warrant review by this Court. We have reached this conclusion only after consideration of a number of factors on each side of that question.

First, although the court of appeals' seeming disregard of the central purpose of termination acts to eliminate the special status of the particular tribe under federal law would be of concern if the court's view were given wide application, the actual holding below does not announce broad new legal principles. In *Oneida II,* the Court reaffirmed the general rule that state statutes of limitation do *not* ordinarily apply to a suit by a tribe to recover land that was conveyed in violation of federal restrictions. Slip op. 13 n.13. The narrow legal issue in this case is whether Congress rendered that general rule inapplicable in the particular circumstances of the Catawba Tribe. Contrary to petitioners' contention (Pet. 11-12), the decision below does not have broader implications for the interpretation of other termination acts. As we have explained (see pages 9-14, *supra*), the court of appeals did not disagree with the proposition that, where termination act language such as that in Section 5 of the Catawba Act applies, it has the effect of lifting federal restrictions on Indian land and subjecting Indian claims to state-law defenses. Rather, relying on what it believed to be the unique text and background of the Catawba Act, the court construed Section 5 as excluding the Tribe from its coverage. See Pet. App. 13a-16a, 17a-18a, 20a-23a. By contrast, the cases upon which petitioners rely (Pet. 13-19,

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Catawbas. See letter reproduced at Br. in Opp. App. 3a-7a. However, the Solicitor's letter did not address the question whether the Catawba Act made the Trade and Intercourse Act inapplicable — and the state statute of limitations applicable — to the Tribe and its land after 1962. That letter also did not consider whether such a suit should be brought by the United States on the Tribe's behalf notwithstanding: (i) Congress's declaration in Section 5 of the Catawba Act that the Tribe is no longer entitled to "special services" performed by the United States for Indians, and (ii) Congress's termination of any relationship with the Tribe and the lifting of federal restrictions from its land. Cf. *United States* v. *Waller,* 243 U.S. 452, 463-464 (1917).



25-26) addressed the effect of treaties and statutes that, unlike the Fourth Circuit's view of the Catawba Act, *did* lift federal restrictions on alienation of Indian land or terminate all aspects of the trust relationship between the United States and the Indians concerned.

Second, the court of appeals' decision is interlocutory in nature. Although the First Circuit held in *Joint Tribal Council of the Passamaquoddy Tride* v. *Morton,* 528 F.2d 370, 376-379 (1975), that the Trade and Intercourse Act applied even where the tribe concerned was not formally recognized by the federal government, the courts below have not yet addressed that issue. Nor have the courts below considered whether the Tribe should be deemed to have abandoned the land or its claim thereto (see U.S. Br. in *Oneida II,* at 38-39 n.35); whether a federal rule of laches might bar this suit (*Oneida II,* slip op. 16-17; *id.* at 9-17 (Stevens, J., dissenting)); or whether equitable principles might limit the relief available (*Oneida II,* slip op. 26 n.27; U.S. Br. in *Oneida II,* at 33-40).[17]

Third, if the Court were to hold that the state statute of limitations is applicable, that disposition might not immediately resolve the underlying controversy concerning the Tribe's interest in the land. Petitioners seem to have conceded below (C.A. Br. 28-30) that although in their view the Tribe's suit is barred by the

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[17]We do not agree with Judge Murnaghan's suggestion (Pet. App. 30a-34a) that a court might hold the United States liable to the Tribe in money damages. The Tribe could have sued the United States under the Indian Claims Commission Act for failing to protect its interests at the time of (or after) the 1840 transaction (see *Oneida II,* slip op. 22 n.25), but it failed to do so. Any present claim for money damages would be subject to the six-year statute of limitations (28 U.S.C. 2501), and there may be other limitations on such a suit. In addition, there is no indication that Congress ever formally recognized the title the Tribe asserts (see page 2, *supra*), and it was South Carolina, not the United States, that acquired the Tribe's land in 1840 and then disposed of it. By contrast, in *Yankton Sioux Tribe* v. *United States,* 272 U.S. 351 (1926), upon which Judge Murnaghan relied (Pet. App. 30a-32a), the United States conveyed the land to third parties, the Tribe had a federally recognized interest in that land, and Congress passed a special jurisdictional act authorizing the suit.

10-year state statute of limitations,[18] this does not necessarily mean that fully unencumbered title is vested in the defendant landowners. That issue turns on the operation of the South Carolina law of adverse possession. Compare *Block* v. *North Dakota*, 461 U.S. 273, 291-292 & n.28 (1983). It appears that under South Carolina law, a person cannot tack onto his own period of adverse possession the period of possession by a prior adverse occupant from whom he took by conveyance. See *Adams* v. *Adams*, 220 S.C. 131, 66 S.E.2d 809 (1951); *Haithcock* v. *Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923), 7 R. Powell, *The Law of Real Property* ¶ 1014[2], at 91-63 (1984). Presumably, some owners of homes and other property in the claims area have not personally been in possession for the 10 years necessary to obtain title by adverse possession.

b. Notwithstanding the foregoing considerations, several factors, especially when considered in combination, persuade us that the Court should grant certiorari.

First, the Tribe seeks possession of more than 140,000 acres of land, and it has sued the named petitioners as representatives of a class allegedly composed of 27,000 defendants who claim an interest in that land. Thus, although the decision below affects only the particular claim of the Catawba Tribe, it appears to be of considerable practical and immediate importance. Compare *United States* v. *Dann*, No. 83-1476 (Feb. 20, 1985).

Second, the degree to which the court of appeals erred is an appropriate consideration in determining whether a particular decision warrants review. Here, the court of appeals' holding that the state statute of limitations ~~issue~~ does not apply is both clearly

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[18]Because the court of appeals held that state law is inapplicable to the Tribe's claim, it had no occasion to consider whether this suit would be barred as to some or all defendants if the South Carolina statute of limitations does apply. The district court, however, held that the suit is barred as to all defendants under the state statute of limitations (Pet. App. 49a). That would appear to be a reasonable interpretation of S.C. Code Ann. §§ 15-3-340 and 15-3-350 (Law. Co-op. 1977); although we do not here express a final view on that question of state law. If the Court were to grant certiorari and hold that this suit is subject to state law defenses, it might choose to remand the case to the court of appeals to decide this question of state law.



erroneous and flatly inconsistent with the congressional judgment that the Catawbas should no longer be entitled to a special status under federal law.

Third, we do not believe that the interlocutory posture of the case should lead the Court to deny review. The purpose of a statute of limitations is to prevent the assertion of claims after passage of a suitable period of time and thereby to protect settled expectations and to prevent the litigation of stale claims. If the Court were to grant certiorari and reverse on the issue of the application of the state statute of limitations, the result under the district court's interpretation of South Carolina law would be the dismissal of the suit as against all 27,000 potential defendants. See no[18], *supra*. This obviously would substantially further the policies of the statute of limitations. In analogous circumstances in *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), the Court granted certiorari to review an interlocutory appellate decision addressing the application of res judicata, which likewise is intended to protect the interest in repose and judicial economy that is at its "zenith in cases concerning real property" (slip op. 17-18 n.10).

Fourth, although the equitable considerations that were discussed by the dissent in *Oneida II* but not resolved by the majority have not yet been presented in this case, those considerations weigh in favor of review here to prevent acknowledged difficulties and unfairness to numerous defendants. Unlike the land claim involved in *Oneida II*, where such equitable considerations might be utilized to temper what might seem (at least insofar as innocent private landowners are concerned) like a harsh result occasioned by application of settled legal principles, this case presents the circumstance in which the equities of innocent landowners would be protected by the straightforward application of such legal principles to overturn an altogether erroneous decision below. Although a holding by this Court that the state statute of limitations applies might not resolve the underlying question of title to certain tracts as to which the period of adverse possession has not run because of South Carolina's no-tacking rule, it presumably would, by virtue of affirming the application

of state law, substantially settle much of the uncertainty occasioned by this suit and would conclusively determine the title question as regards at least substantial portions of the land.

Fifth, unlike in *Oneida II*, where the United States had entered into treaties with the Oneidas that are still in effect (slip op. 2-3), in this case there is no continuing federal relationship with the Tribe. Moreover, although the Court observed in *Oneida II* that Congress might well intervene in the controversy over the New York lands should the occasion arise (slip op. 25), here, an Act already passed by Congress — the Catawba Act — effectively disposes of this lawsuit under the district court's construction of South Carolina law. The Court therefore need not defer to the possibility of a solution to the controversy by Congress at some point in the future.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

JACQUES B. GELIN
ARTHUR E. GOWRAN
*Attorneys*

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# APPENDIX

## STATUTORY AND TREATY PROVISIONS INVOLVED

Section 5 of the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. 935, provides:

> The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

2. The Treaty of Augusta of 1763 between Great Britain and various Indian Tribes provided in pertinent part (Pet. App. 7a n.2; C.A. App. 136-137):

> And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendent on their Parts promise and engage that the aforesaid survey shall be [completed] and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.